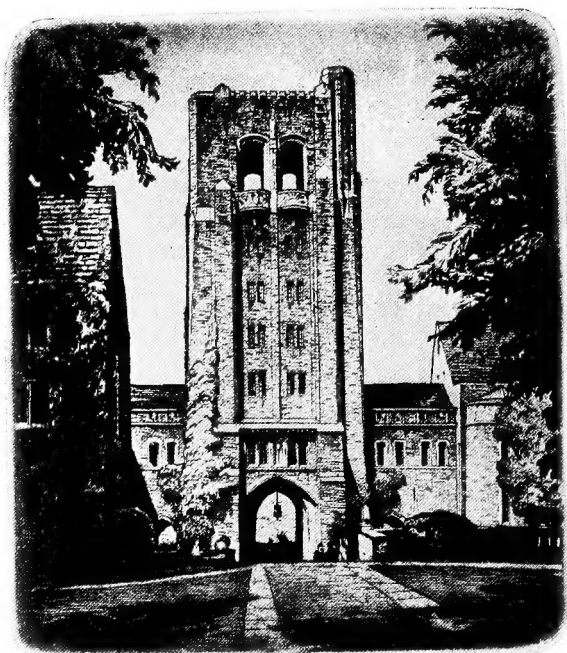




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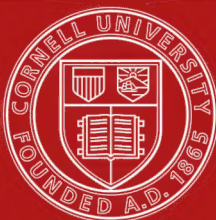
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WINSLOW'S FORMS
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**FOR USE IN ALL CODE STATES, AND SPECIALLY ADAPTED TO
MEET THE REQUIREMENTS OF THE LAWS OF WIS-
CONSIN, MINNESOTA, IOWA, NORTH DAKOTA,
SOUTH DAKOTA AND NEBRASKA**

WITH NOTES

BY
JOHN B. WINSLOW, LL. D.
JUSTICE SUPREME COURT OF WISCONSIN

IN TWO VOLUMES
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PART III.

FORMS OF DEFENSES.

CHAPTER LXXXIII.

DEMURRERS.

- | | |
|---|--|
| 1301. General demurrer to complaint (Wisconsin). | 1314. Demurrer to defense in answer (Minnesota). |
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| 1305. For pendency of another action (Wisconsin). | 1318. General demurrer to petition in equity (Iowa). |
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The demurrer is simply a challenge to the legal sufficiency of the pleading to which it is addressed. At common law a demurrer was called general when it was based on the ground that the facts stated were insufficient to constitute a cause of action, and special when based upon some defect of form of the pleading. The code, however, has generally abolished any such distinction in name, and has provided certain causes for which demurrers will lie, and a demurrer cannot be successfully interposed except for a cause specified in the statute. Notwithstanding this fact, the demurrer for insufficiency of facts is still quite universally called a general demurrer.

A demurrer cannot properly state facts; it will only lie for defects appearing on the face of the pleading demurred to; re-

sort cannot be had either to evidence or other pleadings to help out the pleading attacked; it will not lie to a mere fragment of a pleading, but must be addressed to an entire pleading, or an entire count or separate cause of action; it operates also as an admission of all material facts well pleaded, but not as an admission of mere inferences from facts or conclusions of law. It may be based upon any or all of the statutory grounds, but when several grounds are relied upon they should be numbered and stated separately. The prayer for relief cannot be demurred to, nor is it ground for demurrer that more relief is prayed for than the plaintiff is entitled to.

1301. General demurrer to complaint (Wis. Stats. 1898 sec. 2649; Wis. Laws 1899 c. 217).

[*Title.*]

The defendant [*or if only part of the defendants demur: the defendants, naming the demurrants, demur*] demurs to the complaint herein [*or, to the first, or second, or other, cause of action stated in the complaint herein*] on the ground that it appears upon the face of said complaint* that the same does not state facts sufficient to constitute a cause of action.

E.... F....

Defendant's Attorney,
..... Wis.

1302. Demurrer for want of jurisdiction of the person (Wisconsin).

[*Add to last preceding form, or substitute at**] that the court has no jurisdiction of the person of this defendant [*or, these defendants*].

1303. Demurrer for want of jurisdiction of the subject (Wisconsin).

[*Add to first form in this chapter, or substitute at**] that the court has no jurisdiction of the subject of the action.

1304. Demurrer for incapacity to sue (Wisconsin).¹

[*Add to first form in this chapter, or substitute at**] that the plaintiff has not legal capacity to sue in this, that [*here state particularly the defect, as for instance: the plaintiff is a minor under the age of twenty-one years, and no guardian ad litem has been appointed for the purposes of this action*].

¹ When the demurrer is based upon must be particularly stated. upon this ground the defect relied Wis. Stats. 1898 sec. 2651.

1305. For pendency of another action (Wisconsin).

[*Add to first form in this chapter, or substitute at**] that there is another action pending between the same parties for the same cause.

1306. For defect of parties (Wisconsin).²

[*Add to first form in this chapter, or substitute at**] that there is a defect of parties plaintiff [*or defendant*] by reason of the omission of [*here designate the omitted party either by name or by the character in which he is described in the complaint, e. g.*]: the husband of the plaintiff.

1307. Demurrer for misjoinder of causes of action (Wisconsin).

[*Add to first form in this chapter, or substitute at**] that several causes of action have been improperly united. [*This general statement seems sufficient under Wis. Stats. 1898 sec. 2651; if it is deemed best to state the defect specifically it may be easily done by adding to the foregoing: as follows, to-wit, the first cause of action in said complaint being for breach of a contract of employment, and the second cause of action being in tort to recover for an assault upon the person, or otherwise according to the fact.*]

1308. Demurrer based on statute of limitations (Wisconsin).

[*Add to first form in this chapter, or substitute at**] that the action was not commenced within the time limited by law, to-wit, within the time limited by section of the Statutes of Wisconsin for the year 1898 [*by Wis. Stats. 1898 sec. 2651, when this ground of demurrer is taken there must be a reference to the particular statute relied on*].

1309. Demurrer to defense in answer (Wis. Stats. 1898 sec. 2658).

[*Title.*]

The plaintiff herein demurs to the answer herein [*or, to the first defense stated in the answer herein*], on the ground that

²The defect must be particularly stated if the demurrer be based upon this ground. Wis. Stats. 1898 sec. 2651; Gunderson v. Thomas, 87 Wis. 406. This demurrer only lies for a deficiency,

not for an excess of parties, except in the single case of joining the wife as a plaintiff where she has no interest in the action. Read v. Sang, 21 Wis. 678; G. W. Co. v. Insurance Co., 40 Wis. 373.

upon the face thereof the said answer [*or defense*] does not state facts sufficient to constitute a defense.

E.... F....,
Plaintiff's Attorney.

1310. Demurrer to counter-claim (Wis. Stats. 1898 sec. 2658).

[*Title.*]

The plaintiff herein demurs to the first counter-claim in the answer herein [*or when there are separate answers: in the answer of the defendant C.... D.... herein*], on the ground that upon the face thereof said counter-claim does not state facts sufficient to constitute a counter-claim [because the court has no jurisdiction thereof].

Or: because said defendant has not legal capacity to maintain the same.

Or: because there is another action pending between the same parties for the same cause.

Or: because there is a defect of parties, in this, to-wit, that [*here state what the defect is and whether in parties plaintiff or defendant, and what additional party, naming him, should be present*].

Or: because the said counter-claim does not state facts sufficient to constitute a cause of action.

Or: because the cause of action stated therein is not pleadable as a counter-claim to this action.

E.... F....,
Plaintiff's Attorney.

1311. Demurrer to reply (Wis. Stats. 1898 sec. 2663).

[*Title.*]

The defendant herein demurs to the reply of the plaintiff herein, on the ground that upon the face thereof said reply does not state facts sufficient to constitute a defense.

E.... F....,
Defendant's Attorney.

1312. General demurrer to complaint (Minn. Rev. Laws 1905 sec. 4128).

The defendant demurs [*or, the defendants C.... D.... and E.... F...., naming the demurrants, demur*] to the complaint herein [*or, to the first, or second cause of action stated in the complaint herein*] on the ground that it appears on the face of said complaint* that the same does not state facts sufficient to constitute a cause of action.

G.... H....,
Defendant's Attorney.

1313. Other forms of demurrer (Minn. Rev. Laws 1905 sec. 4128).³

[Add to Form 1312, or substitute at *]:

That the court has no jurisdiction of the person of this defendant [or these defendants].

Or: that the court has no jurisdiction of the subject of the action.

Or: that the plaintiff has not legal capacity to sue.

Or: that there is another action pending between the same parties for the same cause.

Or: that there is a defect of parties plaintiff [or defendant] by reason of the omission of [*here give name of omitted party or describe him as described in the complaint, giving briefly the facts which make him a necessary party*].

Or: that several causes of action are improperly united, to-wit, an action on contract and an action in tort for trespass to real property [or *otherwise state the nature of the actions, according to the fact*].

1314. Demurrer to defense in answer (Minn. Rev. Laws 1905 sec. 4134).

[Title.]

The plaintiff demurs to the answer [or, to the first defense set forth in the answer] herein on the ground that upon its face the said answer [or defense] does not state facts sufficient to constitute a defense.

E.... F....,
Plaintiff's Attorney.

1315. Demurrer to counter-claim (Minn. Rev. Laws 1905 sec. 4134).

[Title.]

The plaintiff demurs to the [first] counter-claim set forth in the answer herein, on the ground that upon its face the same does not state facts sufficient to constitute a counter-claim.

E... F....,
Plaintiff's Attorney.

³ More than one of the various statutory grounds of demurrer may be joined in the same demurrer, but they must be separately stated and should be numbered. The statute of Minnesota does not specifically provide for the raising of the objection by

demurrer that the action is barred by the statute of limitations, but the Supreme Court of that state has held that this objection may be raised by the general demurrer. *Trebbv v. Simmons*, 38 Minn. 509 s.c. 38 N. W. 693. This, however, seems now doubtful.

1316. Demurrer to reply (Minn. Rev. Laws 1905 sec. 4134).

[Title.]

The defendant demurs to the reply herein on the ground that said reply does not state facts sufficient to constitute a defense.

E.... F....,
Defendant's Attorney.

1317. Demurrer to petition (Iowa Code sec. 3561).⁴

[Title.]

The defendant demurs [*or, the defendants C.... D.... and E.... F...., naming the demurrants, demur*] to the petition herein [*or, to the first, or the second count of the petition herein*] on the ground that it appears on the face of said petition [*or count*].*

I. That the court has no jurisdiction of the person of the defendant because said petition shows that [*here state particularly the fact appearing on the face of the petition which shows lack of jurisdiction*].

II. That the court has no jurisdiction of the subject of this action because said petition shows that [*state the facts showing lack of jurisdiction*].

III. That the plaintiff herein has not legal capacity to sue in this, that it appears from said petition that the plaintiff is under the age of majority and is suing in his own name and not by his guardian or next friend [*or state other facts appearing in the petition and showing incapacity to sue*].

IV. That there is another action pending between the same parties for the same cause, to-wit, the action pending in the court [*here describe the other action fully as the same is set forth in the petition*].

V. That there is a defect of parties plaintiff [*or defendant*] because of the omission of [*here name party omitted or describe*

Hardwick v. Ickler, 71 Minn. 35 s.c. 73 N. W. 519. Excess of parties is not ground for demurrer as a defect of parties. Hoard v. Clum, 31 Minn. 186 s.c. 17 N. W. 275.

⁴ In Iowa, by statute, the various grounds of demurrer must be numbered, and it is not sufficient to state the objections in the terms of the statute, but the defect relied upon, whether resulting from facts stated or omitted, must be specifically pointed out;

except that a demurrer to an equitable petition on the ground that the facts stated do not entitle the plaintiff to the relief demanded may be stated in those general terms. Iowa Code sec. 3562.

A misjoinder or excess of parties is not demurrable as a defect of parties. The defect of parties contemplated by the statute is a failure to join a necessary party. Turner v. First National Bank, 26 Iowa, 562.

him as he is described or referred to in the petition, and briefly state the facts showing him to be a necessary party].

VI. That the facts stated in the petition [or count] do not entitle the plaintiff to the relief demanded in this [*here set out particularly the defect in the petition which is relied on*].

VII. That said petition [or count] on the face thereof shows that the cause of action therein stated accrued more than years prior to the commencement of this action, and is therefore barred by the statute of limitations, to-wit, sec. [*name the section relied on*].

VIII. That said petition on the face thereof shows that the cause of action is founded upon an agreement not to be performed within one year from the making thereof [or *state the nature of the agreement, showing it to be one of the agreements required to be in writing under sec. 4625 Iowa Code*], and fails to show said agreement to be in writing as required by law.

IX. That said petition shows on the face thereof that the cause of action is founded on an account [or *other writing, describing it*] as evidence of an indebtedness, and that neither such writing [or account] nor any copy thereof is incorporated or attached to said petition, nor any sufficient reason stated for not doing so.

G.... H....,
Attorney for Defendant.

1318. General demurrer to petition in equity (Iowa Code sec. 3562).

[*Title.*]

[*Proceed as in last preceding form to the * and then substitute as follows*]:

That the facts stated in said petition do not entitle the plaintiff to the relief demanded.

[*See note to preceding form.*]

1319. Demurrer to defense in answer (Iowa Code sec. 3575).

[*Title.*]

The plaintiff demurs to the answer herein [or to the first count of the answer herein] on the ground that it appears on the face of said answer [or count]:

I. That the facts stated therein are not sufficient to constitute a defense in this [*here state specifically the defects claimed*].

E.... F....,
Plaintiff's Attorney.

1320. Demurrer to counter-claim (Iowa Code sec. 3575).

[Title.]

The plaintiff demurs to the first counter-claim set forth in the answer herein on the ground that it appears on the face of said counter-claim:

I. [*Here set forth the causes of demurrer, as in case of a demurrer to a petition. See Form 1317. A demurrer to a counter-claim lies for the same causes as a demurrer to a petition, except that it will not lie for lack of jurisdiction of the person of defendant, and the statute of limitations will not be ground for demurrer if the counter-claim shows that it was defendant's property when it became barred and was barred at the time the plaintiff's claim originated. Iowa Code sec. 3457.*]

E.... F....,
Attorney for Plaintiff.

1321. Demurrer to reply (Iowa Code sec. 3579).

[Title.]

The defendant demurs to the reply herein on the ground that the facts stated in said reply do not amount to a sufficient defense, in this [*here state specifically the defects claimed*].

E.... F....,
Defendant's Attorney.

1322. Demurrer to complaint (N. Dak. Rev. Codes secs. 5268, 5269; S. Dak. Rev. Codes C. P. secs. 121, 122).

[*The statutes of North Dakota and South Dakota specifying the grounds upon which demurrers to complaints may be based are identical in terms, and are also identical with the Wisconsin statutes (Wis. Stats. 1898 sec. 2649) except that there is no provision for a demurrer on the ground of the operation of the statute of limitations. The forms heretofore given in this chapter for demurrers in Wisconsin may therefore doubtless be used with safety in these states, with the exception of the form relating to the statute of limitations. In South Dakota it has been held that a demurrer in the language of the statute is sufficient, except that if based upon lack of jurisdiction it must specify whether the lack be of person or subject-matter, and if based on defect of parties it must specify whether it be of parties plaintiff or defendant. Hudson v. Archer, 4 S. Dak. 128 s.c. 55 N. W. 1099. I have found no direct adjudication on the subject in North Dakota, but in Van Dyke v. Doherty, 6 N. Dak. 263 s.c. 69 N. W. 200, it seems to be intimated that a specific statement of the facts constituting the defect may be necessary in that state.*]

- 1323. Demurrers to answer and reply (N. Dak. Rev. Codes secs. 5277-5279; S. Dak. Rev. Codes C. P. secs. 130-132).**

[*For these demurrers the forms heretofore given in this chapter for use in Minnesota, viz.: Forms 1314, 1315 and 1316, may be used.*]

- 1324. Demurrer to petition. Nebraska (Cobbey's Ann. Stats. of Nebr. secs. 1097, 1098).⁵**

[*Title.*]

The defendant demurs [*or the defendants C.... D.... and E.... F...., naming the demurrants, demur*] to the petition herein [*or to the first, or second cause of action stated in the petition herein*] on the ground that it appears upon the face of said petition:

First. That the court has no jurisdiction of the person of the defendant.

Second. That the court has no jurisdiction of the subject of the action.

Third. That the plaintiff has not legal capacity to sue.

Fourth. That there is another action pending between the same parties for the same cause.

Fifth. That there is a defect of parties plaintiff.

Sixth. That there is a defect of parties defendant.

Seventh. That several causes of action are improperly joined.

Eighth. That the petition does not state facts sufficient to constitute a cause of action.

G.... H....,

Attorney for Defendant.

- 1325. Demurrer to defense in answer (Cobbey's Ann. Stats. of Nebr. sec. 1111).**

[*Title.*]

The plaintiff demurs to the answer herein [*or to the first count of the answer herein*] on the ground that it appears upon the

⁵ In Nebraska the objection that the cause of action is barred by the statute of limitations may be taken advantage of under the general demurrer for insufficiency of facts to constitute a cause of action. *Peters v. Dunnells*, 5 Nebr. 460; *Hurley v. Cox*, 9 Nebr.

230 s.c. 2 N. W. 705. A demurrer for defect of parties lies only where necessary parties have been omitted. *Hardy v. Miller*, 11 Nebr. 395 s.c. 9 N. W. 475; *Baldt v. Budwig*, 19 Nebr. 739 s.c. 28 N. W. 280.

face thereof that said answer [*or count*] does not state facts sufficient to constitute a defense to this action.

E.... F....,
Plaintiff's Attorney.

1326. Demurrer to counter-claim or set-off (Cobbey's Ann. Stats. of Nebr. sec. 1111).

[*Title.*]

The plaintiff demurs to the counter-claim [*or set-off*] set forth in the answer [*or the first count of the answer*] herein on the ground that it appears on the face thereof:

I. That the court has no jurisdiction of the subject-matter of said counter-claim [*or set-off*].

II. [*State other grounds, as in case of demurrer to a petition. See Form 1324.*]

E.... F....,
Plaintiff's Attorney.

CHAPTER LXXXIV.

ANSWERS; FORMAL PARTS AND DENIALS.

- | | |
|---|---|
| 1327. Formal parts of answer, general form. | 1335. Answer upon information and belief. |
| 1328. The same, where there are several defenses and a counter-claim. | 1336. General denial. |
| 1329. Commencement of answer by defendant appearing in person. | 1337. General denial of one of several causes of action. |
| 1330. The same, by defendant sued by wrong name. | 1338. Denial of allegations not otherwise answered. |
| 1331. The same, by infant. | 1339. General denial of knowledge or information sufficient to form a belief. |
| 1332. The same, by lunatic. | 1340. General denial as to a part of the pleading. |
| 1333. The same, by husband and wife answering jointly. | 1341. General denial of knowledge or information, by several defendants answering together. |
| 1334. Answer alleging partial defense. | 1342. Specific denial. |

The purpose of an answer is either to deny material allegations of the complaint, to state additional facts to avoid the effect of the facts set forth in the complaint, or to set up a counter-claim.

Defects appearing on the face of the complaint which are ground for demurrer cannot be taken advantage of by answer: they are waived by failing to demur. This, however, is a general rule subject to exceptions. Thus, in Wisconsin the objection of the operation of the statute of limitations may be taken advantage of by answer in all cases. Wis. Stats. 1898 sec. 2653. In Wisconsin, Minnesota, North Dakota, South Dakota and Nebraska, it is provided by statute that any of the various grounds of demurrer which are not taken advantage of by demurrer or answer shall be deemed waived, except the objection to the jurisdiction of the court and the general objection that the complaint does not state sufficient facts to constitute a cause of action. Wis. Stats. 1898 sec. 2654; Minn. Rev. Laws 1905 sec. 4129; N. Dak. Rev. Codes sec. 5272; S. Dak. Rev. Codes C. P. sec. 125; Cob-

bey's Ann. Stats. of Nebr. sec. 1099. In Iowa it is held generally that where demurrable defects appear on the face of the pleading they must be taken advantage of by demurrer, or they are deemed waived. *Linden v. Green*, 81 Iowa 365 s.c. 46 N. W. 1108; *Daugherty v. C., M. & St. P. Co.*, 87 Iowa 276, s.c. 54 N. W. 219. By statute, however (Iowa Code sec. 3563), the objection that the facts stated in the petition do not entitle the party to any relief may be taken advantage of by motion in arrest of judgment. There cannot be a demurrer and an answer to the same cause of action, but if there be several causes of action in one complaint one may be demurred to and the other answered. The codes generally, if not universally, provide that the defendant may set forth in his answer as many defenses or counter-claims as he may have, whether they be of a legal or equitable nature, but they must be pleaded separately. Defenses which are inconsistent because their allegations of fact are repugnant, so that if one be true the other must be false, cannot be pleaded together, but if both may be true and they are only inconsistent because based on inconsistent legal theories they may be pleaded together. *S. M. B. & Co. v. Harte*, 95 Wis. 592 s.c. 70 N. W. 821; *Maxwell*, Code Pleading, 396, 397; *Pomeroy's Code Remedies* sec. 722; *Steenerson v. Waterbury*, 52 Minn. 211 s.c. 53 N. W. 1146; *Stebbins v. Lardner*, 2 S. Dak. 127 s.c. 48 N. W. 847. In Iowa, by express statute, inconsistent defenses may be pleaded in the same answer or reply. Iowa Code sec. 3620. Each defense or counter-claim pleaded must be complete in itself, but this does not necessarily require repetition at length of facts common to both defenses. If once stated, such facts may be incorporated in another separate defense or counter-claim by reference thereto and appropriate words by which they are adopted. Hypothetical defenses should be avoided if possible, but may be allowable where addressed to a matter not presumptively within defendant's knowledge and coupled with a denial of information and belief as to the truth of such matter.

Denials under the code must be general or specific, the general denial being properly addressed to the whole complaint, and the specific denial to a single allegation. Under denials in either form the defendant cannot prove any affirmative defense, but can only contradict or disprove some part of the plaintiff's proof. The denial should meet only material facts, and if the specific allegation to be denied is in the conjunctive the denial should be in the disjunctive, otherwise the denial will become a negative pregnant and may be held to raise no issue. *Grimm v. Washburn*, 100 Wis. 229; *Bliss*, Code Pl. sec. 332.

reference to and adoption of those allegations will suffice instead of a repetition of them].

Fourth. For a counter-claim to the second alleged cause of action, said defendant alleges, etc.

WHEREFORE, said defendant demands, etc.

1329. Commencement of answer by defendant appearing in person.

The defendant Y.... Z...., in person, answering the plaintiff's complaint herein, alleges [*or, denies*]:

1330. The same, by defendant sued by wrong name.

This defendant, E.... F...., in the summons and complaint in this action called G.... E...., answering the plaintiff's complaint herein, alleges [*or denies*]:

1331. The same, by infant.

This defendant, an infant under the age of twenty-one years, by C.... D...., his guardian, answering the plaintiff's complaint herein, alleges [*or denies*]:

1332. The same, by lunatic.

The defendant E.... F...., a lunatic [*or, a person of unsound mind, or an idiot, or an habitual drunkard*], by M.... N...., his committee and guardian [*or by O.... P...., his duly appointed guardian ad litem*], answering the plaintiff's complaint herein, alleges [*or denies*]:

1333. The same, by husband and wife answering jointly.

E.... F...., one of the above-named defendants, and G.... F...., his wife, answering the plaintiff's complaint in this action, jointly allege [*or deny*]:

1334. Answer alleging partial defense.

The defendant, for a partial defense to the alleged cause of action set forth in the complaint, alleges [*or denies*]:

1335. Answer upon information and belief.

The defendant, answering the complaint of the plaintiff herein, upon information and belief, denies [*or alleges*]:

1336. General denial.

The defendant E.... F...., answering the complaint herein, denies each and every allegation thereof.

1337. General denial of one of several causes of action.

The defendant, answering the first alleged cause of action contained in the complaint herein, denies each and every allegation in the said alleged first cause of action contained.

1338. Denial of allegations not otherwise answered.¹

The defendant, answering the complaint herein, denies each and every allegation in said complaint contained not hereinbefore [or hereinafter] specifically admitted [or specifically controverted].

1339. General denial of knowledge or information sufficient to form a belief.

Says that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of the complaint.

1340. General denial as to a part of the pleading.²

Denies each and every allegation contained in paragraphs numbered and of said complaint.

1341. General denial of knowledge or information, by several defendants answering together.

Severally say, each for himself, that he has no knowledge or information sufficient to form a belief as to the truth of any of the allegations of the said complaint.

1342. Specific denial.

The defendant, answering the complaint herein, denies that he ever indorsed the said note.

¹ This form of denial is quite frequently used and is generally held sufficient, but it must be said that it can hardly be called either a general or specific denial and its use is not to be recommended. *Althouse v. Jamestown*, 91 Wis. 46 s.c. 64 N. W. 423. In Minnesota it is said to be sufficient if

there is no ambiguity as to the matters which are specifically answered. *Jellison v. Halloran*, 40 Minn. 485 s.c. 42 N. W. 392.

² In *Collins v. Singer Mfg. Co.*, 53 Wis. 305, a denial of everything between certain words and folios of the complaint was held insufficient.

CHAPTER LXXXV.

DEFENSES IN ABATEMENT.

- | | |
|---|---|
| 1343. No jurisdiction of the person or subject. | 1354. Non-joinder of other owners in actions relative to land. |
| 1344. The same, by foreign consul. | 1355. Non-joinder of a co-administrator. |
| 1345. That a court of the United States possesses exclusive jurisdiction. | 1356. Non-joinder of a co-executor. |
| 1346. Alien enemy. | 1357. Non-joinder of tenant in common, as to part of the goods. |
| 1348. Another action pending. | 1358. Joint interest in plaintiff and a third person. |
| 1349. Another form, in the case of | 1359. Non-joinder of necessary defendant. |
| 1347. Defendant an Indian. a counter-claim. | 1360. Partnership of defendants with a third person. |
| 1350. Pendency of partnership cause, an answer to partition suit. | 1361. Assignment of cause of action, by plaintiff, to third person. |
| 1351. Misnomer. | |
| 1352. Non-joinder of one who was a party to the contract. | |
| 1353. The same, in case of indorsement, etc. | |

The codes generally do not retain the name "plea" or "answer in abatement," but the inherent nature of such defenses is not changed. They are such defenses as go to the maintenance of the present action alone, as distinguished from defenses which go to the cause of action itself. They are to be pleaded as separate defenses, but are to be pleaded in the same answer with defenses in bar, and not alone and before pleading the defenses in bar, as was the rule at common law.

1343. No jurisdiction of the subject or person.

The defendant, further answering, alleges that this court has no jurisdiction of said supposed cause of action set forth in the complaint [*or, of the person of this defendant*], for the reason that * [*here state the facts showing lack of jurisdiction of subject-matter or person, fully and exactly*].

1344. The same, by foreign consul.

[*As in last preceding form to **, and then continue]: this defendant was at the commencement of this action, and is now,

consul of the King of Italy for the city of duly accredited to the President of the United States, and by him received and acknowledged as such.

1345. That a court of the United States possesses exclusive jurisdiction (sustained in U. S. v. Lathrop, 17 Johns. 4).

I. That said county is within the district, in which there is and was a circuit court of the United States, called a district court, holden for said district.

II. That all suits or penalties and forfeitures incurred under the laws of the United States, to which the United States are parties, arising within said district, ought to be brought in said court, and not elsewhere.

III. That said A.... B...., at the commencement of this suit, was and still is resident within said district, and at

1346. Alien enemy (sustained in Bell v. Chapman, 10 Johnson 183).

I. That the plaintiff was not at the commencement of this action, and is not now, a citizen of the United States, by naturalization or otherwise; but was and is an alien, born in out of the allegiance of the United States, and within the allegiance of the kingdom of

II. That at the commencement of this action the government of said were and still are at war with, and enemies of the United States.

III. That the plaintiff then was, and still is, an alien enemy abiding without the United States, and at, within said, and adhering to the said enemies of the United States.

1347. Defendant an Indian.

That the defendant, at the time of making the said writing obligatory, was, ever since has been, and still is, an Indian, residing on lands reserved to the Indians, within the purview of the act entitled [*title*] passed [*date of enactment*].

1348. Another action pending.

That at the commencement of this action there was, and now is, another action pending in the court, in and for the county of in this state, between the same parties as this action *, and for the same cause as that set forth in the complaint herein.

1349. Another form, in the case of a counter-claim.

[*As in preceding form to the *, continuing*]: in which the plaintiff in this action, being the defendant, has set up the same

cause of action, alleged in the complaint as a counter-claim, against this defendant, who is the plaintiff in the said action.

1350. Pendency of partnership cause, in answer to partition suit (sustained by *Danvers v. Dorrity*, 14 Abb. Pr. 206).

I. That the premises of which the plaintiff seeks partition belong to the parties to the action as tenants in common.

II. That the parties were partners in trade, and carried on business on said premises, and that the said premises were owned by them as such copartners.

III. That in the month of, 19.., the partnership was dissolved by the retirement of one of the defendants therefrom; and in, 19.., and before this action, the defendant D.... commenced an action in the court of against the plaintiff in this action and the defendant R...., demanding judgment that the defendants therein be decreed to render an account of the stock, fixtures, machinery, and effects, and that the plaintiff's interest be adjusted and stated, and that he have judgment for the amount of his interest therein, or that a receiver be appointed to take and sell the property, and distribute it among the partners according to their respective interests; which action is still pending and undetermined.

1351. Misnomer.

That the true name of the plaintiff [*or this defendant*] is, and always has been, E.... F.... and not A.... B...., in which name he sues [*or is sued*].

1352. Non-joinder of one who was a party to the contract.

I. That the supposed contract [*or other cause of action*] mentioned in the complaint, if any such was made, was made with said Y.... Z.... by the plaintiff [*or by the defendant*] and * one M.... N.... jointly [*and if as partners, add: as partners, under the firm-name of Y.... Z.... & Co.*]

II. That the said M.... N.... is still living, at

1353. The same, in case of indorsement, etc.

I. That the supposed note in the complaint alleged to have been indorsed [*or transferred*] to the plaintiff, was not indorsed [*or transferred*] to him individually, but to the plaintiff and one [*continue as in Form 1352 from the **].

1354. Non-joinder of other owners in actions relative to land.

That M.... N.... and O.... P...., residing at are tenants in common with the plaintiff in said lands, and necessary parties to this action.

1355. Non-joinder of a co-administrator.

That after the death of said M.... N.... and on or about the day of, 19.., letters of administration were duly issued to one O.... P.... together with the plaintiff, by the court of the county of; and said O.... P.... thereupon duly qualified as administrator, and still is such, and living at

1356. Non-joinder of a co-executor.

I. That the said M.... N.... the testator mentioned in the complaint, by his will duly appointed the plaintiff and one O.... P...., jointly, executors of his said will.

II. That on or about the day of, 19.., letters testamentary thereupon were duly issued to said O.... P.... [together with the plaintiff] by the court of the county of; and he thereupon duly qualified as executor, and still is such, and living at

1357. Non-joinder of tenant in common, as to part of the goods.

That as to the taking [*or converting*] of said [*here mention the part as designated in the complaint; or, if not there designated, say: a part of the goods mentioned in the complaint, to-wit, a wagon and harness*], the same were at the time of said supposed trespass the property of the plaintiff and one M.... N...., as tenants in common, and not of the plaintiff alone.

II. That the said M.... N.... is still living at

1358. Joint interest in plaintiff and a third person.

I. That the plaintiff had not, at the time of the alleged grievances in the complaint mentioned [nor at any time since] any title to or interest in the [*property, the subject of the action*] therein mentioned, except jointly and undividedly with M.... N.... and O.... P....

II. That said M.... N.... and O.... P.... are still living at

1359. Non-joinder of necessary defendant.

That the said work and labor were done; and money was paid by the plaintiff, at the request of the defendant, jointly with one M.... N...., who is still living at

1360. Partnership of defendants with a third person.

I. That at the time of the making of the contract mentioned in the complaint, these defendants were in partnership with one M.... N...., under the firm name of Z.... N.... & Co.

II. That said note was made by these defendants jointly with said M.... N...., and not otherwise [which the plaintiffs then well knew].

III. That said M.... N.... is still living at

1361. Assignment of cause of action, by plaintiff, to third person.

That after the sale and delivery [*or accruing of other cause of action*] in the complaint alleged, and before this action, the plaintiff duly assigned his cause of action against this defendant arising therefrom [*or, said judgment, etc., or other thing in action*] to one M.... N.... who then became, and still is, the lawful owner and holder thereof.

CHAPTER LXXXVI.

GENERAL DEFENSES ON THE MERITS.

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| 1362. Accord and satisfaction. | 1367. Statute of limitations, ordinary form. |
| 1363. Arbitration and award. | 1368. Statute of limitations in tort action. |
| 1364. Estoppel. | 1369. Foreign statute of limitations in tort action. |
| 1365. Estoppel by former judgment. | 1370. Release. |
| 1366. The same, pleading foreign judgment in detail. | 1371. Specific denial of demand. |

1362. Accord and satisfaction.

That after making the contract [*or other instrument*] and the alleged breach thereof [*or, after committing the said supposed grievances*] in the complaint mentioned [*or in the cause of action in the complaint mentioned*] and before this action, to-wit, on the day of, 19.., * this defendant delivered to the plaintiff, and the plaintiff [*or, to A.... B.... one of the plaintiffs, and said A.... B....*] accepted and received from the defendant dollars [*or, briefly describing the thing delivered, if not money*] in full satisfaction and discharge of the damages [*or moneys, or liability, or debt, as may be appropriate*] in the complaint mentioned, and of all the damages by the plaintiff sustained by reason of the non-performance [*or non-payment, or neglect, or acts*] therein alleged.

1363. Arbitration and award.

I. That after the maturity of the note [*or after the accruing of other cause of action*] mentioned in the complaint, to-wit, on the day of, 19.., the plaintiff and this defendant executed a written agreement, whereby they mutually submitted the demand alleged in the complaint [*among other controversies*] to the arbitration of one M.... N.... who, thereafter and before the commencement of this action, to-wit, on the day of, 19.., by his award then duly made and published, awarded that [*stating the substance of the award*].

II. That the defendant, on the day of, 19..,

and before this action, duly performed said award on his part by [*here state payment or tender*].¹

1364. Estoppel.²

For a further and separate defense the defendant alleges that the plaintiff ought not to be admitted to say [*here state the matter to which the estoppel is interposed, e. g., that said premises belonged to M.... N....*] for the reason that [*here state the facts showing the estoppel, e. g., that the plaintiff, on or about the day of, 19.., conveyed said premises to the defendant by deed, containing a full covenant of warranty.*]

1365. Estoppel by former judgment.

That on the day of, 19.., at in an action brought in the court [*or before M.... N...., a justice of the peace in and for*] by A.... B.... against C.... D...., for the same cause of action as that set forth in the complaint herein, said A.... B.... recovered judgment duly given, upon the merits thereof, against said C.... D.... for dollars [*or state other relief adjudged*] which judgment still remains in full force and unreversed.

1366. The same, pleading foreign judgment in detail (from N. Y., etc., Co. v. Robinson, 25 Abbott's N. C. 116).

I. That an equity suit was heretofore brought by H.... J.... [the person mentioned in the complaint herein as receiver of the Erie Railway company] as such receiver, against this defendant, in the county circuit court, in the state of, the bill of complaint wherein prayed for a decree by which it might be adjudged and decreed, among other things, that this defendant give no consideration for the shares of stock mentioned in the contract, "Exhibit A" annexed to the complaint herein, and had no legal or equitable right or title in or to the same; that the actual title to the shares of stock of M.... N.... [mentioned in the complaint herein] in the company, remained in said Erie Railway company; that this defendant acquired no title to the shares of stock allotted to him [mentioned in the complaint herein] and that

¹ It is unnecessary to allege performance if the award directed payment of the amount found due, for then it is the equivalent of a judgment, but if the award is simply in pursuance of a submission to state an account or fix a sum, and does not purport to direct satisfaction or payment, performance

must be alleged. *Armstrong v. Masten*, 11 Johnson, 189; *Brazill v. Isham*, 12 N. Y. 9.

² Estoppel is an affirmative defense, and to be available the facts must be pleaded as new matter, unless they appear on the face of the complaint.

the actual title remained in the Erie Railway company]; that the agreement, a copy whereof is annexed to the complaint herein, was induced by false and fraudulent representations of said defendant, and that the same should be canceled and annulled; that defendant should be required to pay to said H.... J...., as such receiver, the sum of dollars, with the interest thereon, and for such further and other order of relief as the nature of the case might require, and as might be agreeable to equity and good conscience.

II. That the said bill of complaint was personally subscribed by said H.... J.... and verified by him upon oath on, 19.., and contains all the allegations material to the present action which are contained in the amended complaint herein, except that [if it be a material allegation] said receiver and said Erie Railway company were induced to make said contract ["Exhibit A" annexed to the complaint herein] by reason of the statements of this defendant that his title to said stock was a good and clear title, and that no other person had a lawful claim thereto; but that this matter might have been also litigated in the aforesaid suit. The paper hereto annexed as a part hereof and marked "Exhibit A," is a true copy of the bill of complaint in said suit.

III. That the plaintiff herein, on or about, 19.., became a party complainant to the suit mentioned in said paragraph, and filed a supplemental bill of complaint therein by leave of the said court; that answers were duly filed to the said bill and supplemental bill therein by this defendant, denying the equities set up in said bills; that a replication was duly filed by the complainant, and said suit duly came on to be heard by said court in chancery, and each party introduced evidence upon said hearing, and the taking of evidence therein was closed, and thereafter, and on or about the day of, 19.., the said bill and supplemental bill in said suit were dismissed by order of the said court, a copy of which order is hereto annexed as a part hereof and marked "Exhibit B," and that the recitals in said order were and are true.

IV. That by said order the matters in this action were finally adjudicated and settled, and that the plaintiff is thereby barred from prosecuting or maintaining this action.

1367. Statute of limitations, ordinary form.³

That the cause of action stated in the complaint [or, that as to dollars, part of the cause of action stated in the

³ As to when the statute of limitations may be taken advantage of by demurrer, see Chapter LXXXIII, *supra*, and notes.

complaint, the same] did not accrue within years before the commencement of this action.

1368. Statute of limitations in tort action.

That the defendant was not guilty of the grievances alleged in the complaint [*or, in the first cause of action in the complaint*] at any time within years before the commencement of this action.

1369. Foreign statute of limitations in tort action (adapted from *Emgartner v. Steel Co.*, 103 Wis. 373).

For a further and separate defense, the defendant alleges that the said personal injury described in the complaint occurred in the state of and that at the time of the occurrence thereof, to-wit, the day of, 19.., and at all times thereafter to the present time both the plaintiff and this defendant were and still are citizens and residents of the state of, and that at the time of said injury there was, ever since has been, and still is a statute of the state of known as section of chapter ... of the Revised Statutes of said state which provides as follows [*give copy of section, or state its substance*]. That no action was begun by the plaintiff to recover on account of said alleged injury in the said state of within years next after the cause of action alleged in said complaint accrued, nor was this action commenced within said period of two years. Wherefore this defendant alleges that the said cause of action has become and is by virtue of the operation of said statute completely barred.

1370. Release.

[*As in first form in this chapter to the *, then continuing*]: the plaintiff [*or, the plaintiffs jointly, or, A.... B...., one of the plaintiffs*], in consideration of, by deed, released this defendant from the claim set up in the complaint [*or, executed to this defendant a release, of which the following is a copy: [giving copy]*].

1371. Specific denial of demand.

The defendant denies that the plaintiff at any time demanded the [proceeds of the goods] in said complaint mentioned at any time prior to the commencement of this action.

CHAPTER LXXXVII.

VARIOUS ALLEGATIONS AND DENIALS RELATING TO CAPACITY TO SUE OR BE SUED.

- | | |
|---|---|
| 1372. Denial of assignment. | 1375. Denial of partnership. |
| 1373. Allegation of payment to assignor without notice. | 1376. Denial of representative character. |
| 1374. Denial of incorporation of plaintiff. | 1377. Allegation that executor renounced. |

1372. Denial of assignment.

The defendant [upon information and belief] denies that the said [*alleged assignor*] on the day of, 19.., or at any other time, assigned or transferred to the plaintiff the said note and mortgage [*or in case of a mere claim or cause of action, the said claim or cause of action*] described in the complaint, and denies that the plaintiff was or is the holder or owner thereof. [*If the execution of a formal instrument of assignment is alleged in the complaint, the above form should be varied so as to deny that the alleged assignor on the day of, 19.., or at any other time executed or delivered to the plaintiff the alleged assignment of the said note and mortgage, or claim as in said complaint alleged, etc.*]

1373. Allegation of payment to assignor without notice.

That on or about the day of, 19.., and prior to the commencement of this action the defendant, without knowledge or notice of the alleged assignment of the said note [*or claim*] described in the complaint, paid to the said assignor the full amount due thereon [*or the sum of dollars*] which was accepted and received by the said [*assignor*] in full payment and discharge of said note [*or claim, or cause of action*].

1374. Denial of incorporation of plaintiff.

The defendant, further answering the complaint herein, expressly denies * that the said plaintiff was at the time of the commencement of this action or now is a corporation as in said complaint alleged.

[*This is doubtless sufficient denial in Wisconsin (Wis. Stats. 1898 sec. 4199) and in Nebraska (Maxwell's Code Pleading, Form 511), but in Minnesota, Iowa, North Dakota and South Dakota there should be an affirmative allegation that the plaintiff is not a corporation (Minn. Rev. Laws 1905 sec. 4148; N. Dak. Rev. Codes sec. 5754; S. Dak. Rev. Codes C. C. sec. 414; Iowa Code secs. 3627, 3628), and in these last named states the answer should proceed as above to * and continue: all allegations of said complaint relating to the alleged incorporation of the plaintiff, and alleges that the plaintiff was not at the time of the commencement of this action and is not now a corporation (in Iowa add:) and was never incorporated under the laws of this state or of any other state or government.*]

[*Add verification.*]

1375. Denial of partnership (Wis. Stats. 1898 sec. 4197; Minn. Rev. Laws 1905 sec. 4149; Iowa Code secs. 3627, 3628).

The defendant, further answering the complaint, expressly denies that the said A.... B.... and C.... D.... were or are partners, as alleged in said complaint, and on the contrary alleges that the said A.... B.... and C.... D.... were not at the time of the commencement of this action and are not now partners. [*Or, that the said A.... B.... was not and is not a partner with the said, naming the others.*]

[*Add verification.*]

1376. Denial of representative character (Wis. Stats. 1898 sec. 4200; Iowa Code secs. 3627, 3628).

The defendant, further answering the complaint, expressly denies that the plaintiff was on the day of, 19.., or at any time, appointed executor of the estate of E.... F.... deceased [*or administrator, or guardian, or trustee, as the case may be*], and denies that the said plaintiff was or is now such executor [*or guardian, etc.*] [*In Iowa add: and on the contrary alleges that the said plaintiff was never appointed such executor, or guardian, and is not now such executor, or guardian, etc.*]

[*Add verification.*]

1377. Allegation that executor renounced.

I. That said executor, after the death of the testator, and on or about the day of, 19.., by writing signed by him, and attested by two witnesses, and proved to the satisfaction of the court of the county of, before whom said will was proved, renounced said appointment as executor

[leaving said co-executor, who is still living, sole executor of said will] ; which renunciation was duly filed in the office of said court.

[II. That said co-executor has duly qualified and taken upon himself the execution of said will, and is now such executor.]

[Or: II. That thereupon letters of administration with said will annexed were issued upon said M.... N....'s estate to one O.... P.... by the said court, by an order duly made on the day of, 19..]

CHAPTER LXXXVIII.

DENIALS OF THE CONTRACT SUED ON.

- | | |
|---|---|
| 1378. Denial of the contract, general form. | 1381. Allegation of delivery in escrow. |
| 1379. Denial of deed. | 1382. Denial of indebtedness. |
| 1380. Denial of conditional delivery. | 1383. The same, admitting part. |

1378. Denial of the contract, general form.

The defendant denies that on the day of , 19... , or at any other time, he made or entered into the agreement mentioned and described in paragraph one, of the complaint herein.

1379. Denial of deed.

The defendant denies that on the day of , 19... , or at any other time, he executed or delivered to the plaintiff the deed mentioned and described in said complaint.

1380. Denial of conditional delivery.

The defendant denies the allegations of the complaint herein whereby it is alleged that the said note [*or deed*] described in said complaint was executed and delivered by the plaintiff upon the condition or understanding set forth in said complaint, and on the contrary thereof this defendant alleges that the said note [*or deed*] was executed and delivered by the said plaintiff absolutely and without condition.

1381. Allegation of delivery in escrow.

I. The defendant alleges that he gave said deed [*or other writing*] to secure the repayment of dollars, then lent by the plaintiff to one M.... N.... , and that he delivered said deed, not to the plaintiff or his agent, but to one O.... P.... as an escrow, to be kept by him upon condition that if the said M.... N.... should within months secure the repayment of said sum of money to the plaintiff by a mortgage upon his freehold at ; that then the said deed should be immediately discharged and annulled, and returned to the defendant, and that only in case of default of the said M.... N.... so securing the repayment of the said sum, should the said deed of the defendant stand in force.

II. That within the time agreed, and on the day of, 19.., said M.... N.... did secure the repayment of the said sum to the plaintiff by a mortgage upon said freehold, which the plaintiff then and there accepted as such security; whereby the deed of the defendant so delivered in escrow became void.

1382. Denial of indebtedness.¹

The defendant denies that he is now or was at the time of the commencement of this action indebted to the plaintiff in the sum of dollars or in any other sum.

1383. The same, admitting part.

The defendant admits that he is indebted to the plaintiff in the sum of dollars, and consents that the plaintiff have judgment therefor, but as to the residue of the sum claimed by the plaintiff in his complaint, the defendant denies that he is now or was at the time of the commencement of this action so indebted.

¹ This and the following form are only proper to be used where the complaint contains simply a general allegation of indebtedness. If the facts showing the in-

debtedness are specifically pleaded in the complaint they must be either generally or specifically denied.

CHAPTER LXXXIX.

INVALIDITY OF THE CONTRACT SUED ON.

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|---|--|
| <p>1384. Coverture of the defendant.</p> <p>1385. That defendant was a married woman, and signed the note as surety only for her husband.</p> <p>1386. Infancy of defendant.</p> <p>1387. Insanity of defendant.</p> <p>1388. Fraud in procuring contract.</p> <p>1389. Duress by imprisonment.</p> <p>1390. Duress by threats.</p> <p>1391. Statute of frauds, as to leasing or sale of lands.</p> <p>1392. The same, as to agreement not to be performed within a year.</p> <p>1393. The same, as to special promise to answer for default, etc., of another.</p> | <p>1394. The same, as to agreement in consideration of marriage.</p> <p>1395. The same, as to sale of personal property.</p> <p>1396. Ultra vires of corporation.</p> <p>1397. That the contract sued on is a foreign one, void by the law of the place.</p> <p>1398. That the contract was a cover for a wager.</p> <p>1399. That the debt was for money lost at play.</p> <p>1400. That the contract was made to compound a felony.</p> <p>1401. Note given for liquors sold without license.</p> <p>1402. Usury by ante-dating security.</p> <p>1403. That the contract was made on Sunday.</p> |
|---|--|

Unless the illegal character of the contract appears upon the face of the complaint the facts establishing its illegality must be distinctly set up in the answer in order to entitle the defendant to introduce proof thereof. Such proof will not be admitted under a mere denial of the contract.

1384. Coverture of the defendant.¹

That at the time of the making of the supposed [contract] alleged in the complaint, this defendant was [and still is] the wife of one M. . . . N. . . . [and that she did not then have nor has she now any separate property or business of any nature, or in case she has a separate estate or business, and that the said supposed contract did not in any way concern the separate property or business of this defendant].

¹ The married women's acts in some states doubtless eliminate this defense. No attempt is here made to determine to what extent this is true; the law of the par-

ticular state should be carefully studied. In Wisconsin the defense still seems available. Wis. Stats. 1898 sec. 2345.

1385. That defendant was a married woman, and signed the note as surety only for her husband (adapted from Emerson Co. v. Knapp, 90 Wis. 34).

That at the time this defendant signed the said note described in the complaint she was and still is a married woman and the wife of C.... D.... and that the said C.... D.... executed said notes as principal maker in payment of a debt then owing by him individually to the plaintiff, and for no other consideration, and that this defendant thereupon signed said note at the request of and as surety for her said husband and not otherwise, and this defendant received no consideration for said note nor did the same in any way concern her separate property or business.

[See note to the last preceding form.]

1386. Infancy of defendant.

That at the time of making the supposed contract [and of the delivery of the goods, *or other consideration*] alleged, the defendant was under the age of twenty-one years; to-wit, ... years of age, and that the said supposed contract was not entered into for the purchase of necessities for this defendant [*or that the said goods so delivered were not necessities*].

1387. Insanity of defendant.

That at the time of the making of the alleged promise [*or agreement, or of the executing of the alleged deed*] the defendant was of unsound mind, and thereby incapable of making [*or executing*], and of understanding the same, as the plaintiff then well knew.

1388. Fraud in procuring contract.

I. That the instrument mentioned in the complaint was obtained from defendant by the plaintiff [and others in collusion with him] by fraud and misrepresentations, in this, that the said plaintiff [and one E.... F....] then and there falsely and fraudulently represented to the defendant [*here set forth the alleged false representations as fully and specifically as in a complaint in an action founded upon fraud or deceit or an action brought for the cancellation of instruments on the ground of fraud, for which see previous chapters of this work on those subjects*].

II. That this defendant then and there relied upon the said false representations so made, and believed them to be true, and so relying and believing was thereby induced to execute and deliver the said instrument, and not otherwise. [*If defendant has*

received any consideration, a return or offer to return the same should be alleged, and if affirmative relief be sought the defense should be pleaded as a counter-claim and judgment demanded, as for instance] :

WHEREFORE the defendant demands judgment that the said instrument be adjudged void and be delivered up to be cancelled, and for such further relief as may be just and equitable, with costs.

1389. Duress by imprisonment.

That the defendant, at the time of the making of the said [contract] was imprisoned by the said plaintiff [and others in collusion with him] and then and there detained and forcibly deprived of his liberty until, solely by reason of the force and duress of such imprisonment and in order that he might be released therefrom, he executed and delivered the said [contract] to the plaintiff. [*If affirmative relief by way of cancellation of the instrument or otherwise is necessary, plead as a counter-claim, add allegations as to return or readiness to return consideration, and demand for judgment as in last preceding form.*]

1390. Duress by threats.

That the instrument in the complaint mentioned was obtained from the defendant by the plaintiff [and others in collusion with him] by duress of the defendant, in this, that the said defendant then and there threatened the defendant that [*here state specifically the threats used*], and that the defendant, solely in consequence of said threats and in the fear that the plaintiff would execute the same, made and delivered the said instrument and not otherwise. [*If necessary to plead as a counter-claim, add the necessary allegations and demand for judgment as indicated in two preceding forms.*]

1391. Statute of frauds, as to leasing or sale of lands.²

That neither the said lease, though for a longer period than one year [*or, said contract for the sale of said lands*], nor any note or memorandum thereof expressing the consideration, was ever in writing and subscribed by the said C.... D.... by whom

² The statute of frauds of the various states covered by this work, though substantially similar, differ in some particulars, and the statute of the particular state should be carefully examined before framing the pleading. This

form and the following forms are believed to be adapted for use as given in the states of Wisconsin and Minnesota. Wis. Stats. 1898 secs. 2307, 2308, 2304; Minn. Rev. Laws 1905 secs. 3483, 3484, 3488. In Iowa, North Dakota, South Da-

the lease [*or sale*] is alleged to have been made, or by any lawfully authorized agent of said C.... D.... [nor was the said agreement ever partly performed].

1392. The same, as to agreement not to be performed within a year.

That although the said agreement by its terms not to be performed within one year from the making thereof, neither said agreement nor any note or memorandum thereof [expressing the consideration] was ever in writing and subscribed by the said C.... D.... who is sought to be charged therewith [or by his authorized agent.]

[*See note to preceding form.*]

1393. The same, as to special promise to answer for default, etc., of another.

I. That the supposed promise in the complaint alleged is a special promise to answer for the debt [*or default, or miscarriage*] of another person, to-wit, M.... N.... in said complaint mentioned.

II. That no note or memorandum of such contract [expressing any consideration] was made in writing, or subscribed by the party to be charged therewith, to-wit, this defendant [or by his authorized agent] [but on the contrary, the same was wholly without consideration].

[*See note to Form 1391.*]

1394. The same, as to agreement in consideration of marriage.

That the said alleged agreement [*or promise, or undertaking*] in the complaint set forth was made upon consideration of marriage, and neither said agreement, nor any note or memorandum thereof [expressing the consideration] was ever in writing, and subscribed by the said C.... D...., who is sought to be charged therewith [or by his authorized agent].

[*See note to Form 1391.*]

1395. The same, as to sale of personal property.

That although said alleged contract was for the sale of goods [*or chattels, or things in action*] for the price of fifty dollars

kota and Nebraska it is not required that the written memorandum should express the consideration. Iowa Code sec. 4625; N. Dak. Rev. Codes secs. 3958-3960; S. Dak. Rev. Codes C. C. sec. 1238; Cobbey's Ann. Stats. of

Nebr. secs. 5954, 5957, 5958. In North Dakota, South Dakota and Iowa the memorandum may in all cases be signed by an authorized agent; while in Nebraska it is required in all cases to be signed by the party.

or more, no note or memorandum thereof was ever made in writing, and subscribed by the said C.... D.... sought to be charged thereby [or by his authorized agent] nor did the said [buyer] accept and receive any part of such goods [or any of the evidences of such things in action]; nor did the said [buyer] at the time, pay any part of the purchase money.

[See note to Form 1391.]

1396. Ultra vires of corporation.

I. That the plaintiff [or said company] was not authorized by law to take, hold, and convey real property, except for the following purposes, and in the following manner [*here set forth the power of the corporation*].

II. That the deed alleged in the complaint was executed [and accepted] on the part of said corporation for the purpose of [*here state purposes and manner not within the power*].

1397. That the contract sued on is a foreign one, void by the law of the place.

I. That the [contract] alleged in the complaint was made without this state, and in the state of [*or in the kingdom of France*] where the defendant was then domiciled.

II. That by an act of the legislature of said state, entitled "An Act, etc.," passed on, etc., it is enacted that [*here set forth the law relied on, and if there be exceptions, add allegations showing that the contract is not within them*].

1398. That the contract was a cover for a wager.

I. That at the time of the alleged contract the defendant was not a dealer in the merchandise mentioned therein, nor had he the possession or control of any thereof.

II. That it was the intent of the parties not to make any actual sale or delivery thereof, but at the maturity of said contract that the difference between the market value and the contract price should be paid by one party to the other.

III. That the market price of such merchandise at the maturity of the contract was, at the time of making the contract, contingent and uncertain; and the contract was a mere wager on the future market price thereof, and contrary to the statute.

1399. That the debt was for money lost at play.

I. That the defendant and the plaintiff played together at a game of chance called for stakes, upon credit, and not for ready money; and at said gaming the plaintiff won dollars of the defendant, which he did not pay.

II. That thereafter the defendant gave the plaintiff the note mentioned in the complaint for said money so staked and lost.

1400. That the contract was made to compound a felony.

I. That heretofore, on the day of, 19.., at one L.... M.... the son of the said defendant, had feloniously [*here designate the crime, e. g. stolen, taken, and carried away a horse, the property of the plaintiff*].

II. That the said defendant, in order to compound and settle said felony, executed the contract described in the complaint, in consideration of which, the plaintiff and others desisted from informing and prosecuting upon said felony.

III. That there was no other consideration for said contract.

1401. Note given for liquor sold without license.

I. That the only consideration for said note was for the sale of strong or spirituous liquors, sold by said [*payee*] in quantities less than five gallons to said defendant in the town of, and county of the said [*seller*] at the time of such sale, having no license for the sale thereof, as required by the Laws of 19.., either grocer or tavern license.

II. That the said note was transferred to the plaintiff after it was due, and without consideration, and after he had full notice of the foregoing facts.

[*See Melchoir v. McCarty, 31 Wis. 252.*]

1402. Usury by ante-dating security.

I. That he gave said bond and mortgage upon a loan made to him by the plaintiff, and which was first agreed for on the day of, 19.. [*or to secure the purchase-money of lands conveyed to him by the plaintiff on the day of, 19.., on which day, and not before, said purchase-money accrued to the plaintiff*].

II. That the said bond and mortgage were ante-dated as of the day of, 19.., upon an agreement between the parties that the defendant should secure and pay to the plaintiff, in addition to interest at the rate of seven per cent. on said loan [*or purchase-money*] from said day, the further sum of dollars as interest thereon from the day on which said bond and mortgage bore date, until the day above named, as a cover for usury.

III. That in pursuance of said usurious agreement, the said bond and mortgage were given, and thereafter said sum of dollars was paid by the said defendant, and exacted and accepted by the plaintiff.

1403. That the contract was made on Sunday.

The defendant alleges that [the said promissory note in the complaint set forth was executed and delivered by this defendant, *or* the said goods and merchandise described in the complaint were sold and delivered to this defendant] on the first day of the week, commonly called Sunday, to-wit, on the day of, 19.., and not otherwise.

CHAPTER XC.

PAYMENT, PERFORMANCE OR DISCHARGE OF THE CONTRACT SUED ON.

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| <p>1404. Payment before action.</p> <p>1405. Payment after action.</p> <p>1406. Payment by accepted negotiable draft which plaintiff has lost.</p> <p>1407. Payment by accepted negotiable draft which plaintiff has negotiated.</p> <p>1408. Suspension of remedy by note or draft not yet due.</p> <p>1409. That plaintiff has taken a higher security by a bond.</p> <p>1410. The same, by a judgment.</p> <p>1411. Denying the promise as to part, and pleading payment or tender as to the balance.</p> <p>1412. Denying value claimed, and pleading payment or tender.</p> <p>1413. Payment in services.</p> <p>1414. That a mortgage was given to secure the debt; under which the plaintiff took the mortgaged property.</p> <p>1415. Novation, by substitution of new creditor.</p> <p>1416. The same, in case of a promise to apply indebtedness</p> | <p>upon a mortgage by the plaintiff.</p> <p>1417. A demand before or after the plaintiff's tender.</p> <p>1418. Performance of conditions precedent under statute.</p> <p>1419. Tender of payment.</p> <p>1420. Payment of part and tender of balance.</p> <p>1421. Denial of part, and tender of residue.</p> <p>1422. Compromise.</p> <p>1423. Composition deed.</p> <p>1424. Rescission of contract.</p> <p>1425. By surety alleging an alteration of the contract.</p> <p>1426. Traverse of plaintiff's general allegation of performance.</p> <p>1427. Set off.</p> <p>1428. The same, by executors.</p> <p>1429. The same, in an action by executors.</p> <p>1430. That plaintiff has been adjudged a bankrupt.</p> <p>1431. Discharge in bankruptcy.</p> <p>1432. Discharge under state insolvency law (Wisconsin).</p> <p>1433. Payment by delivery of property.</p> |
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These defenses are all affirmative in their nature, and must be specifically pleaded. Evidence to sustain them is not admissible under a general denial.

1404. Payment before action.

That before this action and on or about the day of, 19.., this defendant paid to the plaintiff dollars in full [or in part] payment of the said note [or other indebtedness].

1405. Payment after action.

That after the commencement of this action, and on or about the day of, 19.., this defendant paid to the plaintiff the sum of dollars in full payment of the said note [or claim] set forth in the plaintiff's complaint, together with the further sum of dollars, being the total amount of all costs which had accrued in this action at the time of said payment.

1406. Payment by accepted negotiable draft which plaintiff has lost.

I. That before the commencement of this action the plaintiff drew his negotiable draft on the defendant for the amount of said account [or other indebtedness alleged] dated on the day of, 19.., payable to the order of E.... F.... and indorsed by the said payee [or to his own order and indorsed by him] and due months after said date, which said draft was thereafter duly accepted by the said defendant so indorsed.

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards and before the same became due and payable lost the same, and cannot produce it to the defendant.

1407. Payment by accepted negotiable draft which plaintiff has negotiated.

I. [*As in last preceding form.*]

II. That the plaintiff received said acceptance on account of said indebtedness, and afterwards, and before the same became due and payable indorsed and delivered the same for value to some person to the defendant unknown, who from thence hitherto has been and now is the *bona fide* owner and holder thereof, and entitled to sue the defendant thereon.

1408. Suspension of remedy by note or draft not yet due.

That after the accruing of the alleged debt, and before this action, the defendant delivered to the plaintiff, and the plaintiff received from him, for and on account of said debt, a bill of exchange * drawn by the plaintiff upon, and accepted by the defendant [or a promissory note made by the defendant] dated the day of, 19.., for the sum of dollars, payable to the plaintiff, or order, ... months after date, ** which period had not elapsed at the commencement of this action.

[*If the draft was drawn by defendant on a third person, or by one third person upon another, insert between the * and ** in this form, the following*]: drawn by the defendant [or by

M.... N.... on, and accepted by O.... P...., and indorsed by the defendant, whereby the defendant [*or said M.... N....*] required the said O.... P.... to pay the defendant or order dollars, ... months after the date thereof.

1409. That plaintiff has taken a higher security by a bond.

I. That after said account [*or note, or other simple contract-debt*] became due, and before this action the plaintiff and this defendant agreed that the defendant should give the plaintiff his bond under seal [*or should confess judgment to the plaintiff*] for said sum so due.

II. That in pursuance of said agreement, this defendant, on the day of, 19.., gave to the plaintiff his bond under seal in the penal sum of dollars, conditioned for the payment by him to said plaintiff of said sum of dollars so due, on the day of, 19.., at, with interest.

1410. The same, by a judgment.

I. [*As in the preceding form.*]

II. That in pursuance of said agreement this defendant confessed judgment in the court of to the plaintiff for said sum; which judgment was on the day of, 19.., duly entered in the office of the clerk of the court.

1411. Denying the promise as to part, and pleading payment or tender as to the balance.

I. The defendant denies that he at any time promised to pay the plaintiff for the goods and merchandise described in the complaint [*or for the services set forth in the complaint*] the sum of dollars, and on the contrary alleges that he agreed to pay the plaintiff therefor the sum of dollars, and no more.

II. That on or about the day of, 19.., and before the commencement of this action, the defendant paid to the said plaintiff the said sum of dollars in full payment and discharge of the plaintiff's said claim.

[*Or in case of tender before action*]: II. That on or about the day of, 19.., and before the commencement of this action, the defendant duly tendered to the plaintiff the said sum of dollars, in payment of the plaintiff's said claim, and that the said plaintiff then refused, and has ever since refused to receive the same, although the plaintiff ever since has been and still is ready and willing to pay the same to the plaintiff.

iff, and now brings the same into court and deposits the same for the benefit of the plaintiff.

1412. Denying value claimed, and pleading payment or tender.

I. The defendant denies that the goods and merchandise described in the complaint [*or the services described in the complaint*] were or are of the value of dollars, as in said complaint alleged, and on the contrary the defendant alleges that the same were worth dollars and no more [*or did not exceed dollars in value*].

II. [*Allege payment or tender, as in preceding form.*]

1413. Payment in services.

I. That after the said promissory note was made [*or became payable*] and before this action, to-wit, on the day of, 19.., the said plaintiff agreed to receive, and the said defendant agreed to give to the said plaintiff, his work as a carpenter, to the amount due and payable on the said note, which said work was to be received in payment of said note.

II. That the defendant afterwards, according to the said agreement, did for the said plaintiff carpenter work to the full amount due and payable on the said note.

1414. That a mortgage was given to secure the debt; under which the plaintiff took the mortgaged property.

I. That at the time of giving said note [*or incurring other debt alleged*] he gave a chattel mortgage upon said goods [*or briefly designate the subject of the mortgage, e. g., the household furniture in his dwelling at*] which mortgage was upon condition that if the said note [*or other debt*] was not paid when due, the plaintiff might take the [*goods*] and dispose of them at public or private sale, and out of the avails retain the amount due [upon the note], with costs and expenses, paying over the surplus, if any, to the defendant.

II. That on the day of, 19.., and before this action, the plaintiff took possession of the [*goods*] to dispose of them; and that the same have not since been returned to the defendant.

III. That said [*goods*] were then of the value of dollars, and exceeded the amount then due the plaintiff on said note [*or other indebtedness*] together with the necessary costs and expenses of foreclosure of said mortgage.

1415. Novation, by substitution of new creditor.

That on the day of, 19.., at, at the request of the plaintiff, he made his promissory note [*or, his bond,*

under seal] to one M.... N.... for dollars, in discharge of the indebtedness stated in the complaint.

1416. The same, in case of a promise to apply indebtedness upon a mortgage by the plaintiff.

I. That before the delivery by the plaintiff to the defendants of the goods in the complaint mentioned, the said goods, or part thereof, were mortgaged by the plaintiff to one M.... N...., who, by virtue of said mortgage, had a lien and control over the said goods, and the said plaintiff was unable to deliver them to the defendants; and in order that he might deliver said goods to the defendants, freed and discharged from the said mortgage, and all claim and lien of the said M.... N...., it was then and there agreed by and between the defendants and the plaintiff and said M.... N...., that in consideration that he, the said M.... N...., should and did, at the request of said plaintiff, release the said goods of and from all his lien and claim thereon, to the end that the same might be delivered by the plaintiff to the defendants free of said mortgage and lien; that the defendants should, before payment for said goods, deduct and retain out of any moneys that should be or become due from them, enough to be applied to satisfy and discharge, so far as the same would extend, any sum which at the time of such payment should be due from plaintiff to M.... N.... on said mortgage.

II. That the said M.... N...., relying on such agreement, and in consideration thereof, did, after the making of said agreement, and before the delivery of said goods to the defendants, and at the request of said plaintiff, release and discharge the said goods from the said mortgage, and his claim or lien thereon.

III. That afterwards, upon an accounting between the parties, there was found due from the plaintiff to the said M.... N...., a sum exceeding the amount due from the defendants; namely, the sum of dollars, and interest thereon from the day of, 19.., and of which the defendants then and there had notice.

IV. That the defendants thereupon paid to the said M.... N.... [or, at the request of said M.... N...., held and retained to and for his use and benefit] the said sum due from the defendants in payment and satisfaction, so far as the same would extend, of the said then existing indebtedness of the plaintiff to the said M.... N...., and which the said M.... N.... was then and there ready and willing should be applied, and it was applied, in satisfaction and discharge, so far as the same would extend, of the said then indebtedness of the said

plaintiff to said M.... N...., in pursuance of the said agreement.

1417. A demand before or after the plaintiff's tender.

I. That before the making of the tender alleged [*or, after the making of the tender alleged, and before this action*], and on the day of, 19.., at, the defendant requested the plaintiff to pay him said sum [*or, to deliver to him said deed, or to perform the act in question, according to the fact*].

II. That the plaintiff then and ever since refused to pay [*or, to deliver*] the same.

1418. Performance of conditions precedent under statute.¹

That before the commencement of this action the defendant duly performed all the conditions of the contract set forth in the complaint on his part to be performed.

1419. Tender of payment.²

I. That before this action, and on the day of, 19.., at this defendant tendered to the plaintiff dollars in payment of said note and interest [*or other indebtedness*], but he refused to receive the same.

II. That this defendant has ever since remained, and still is, ready and willing to pay to the plaintiff said sum; but the plaintiff has hitherto refused to receive the same.

III. That this defendant now brings the said sum of dollars into this court [*or if already paid into court: that this defendant has paid said sum of dollars into this court in this action*] ready to be paid to the plaintiff, if he will accept the same.

1420. Payment of part and tender of balance.

I. That on or about the day of, 19.., and before the commencement of this action, this defendant paid to the plaintiff dollars, in part payment of the said note [*or account, or other indebtedness*].

¹ This general method of pleading performance of conditions precedent is generally authorized by express statute. Wis. Stats 1898 sec. 2674; Minn. Rev. Laws 1905 sec. 4150; Iowa Code sec. 3626; N. Dak. Rev. Codes sec. 5286; S. Dak. Rev. Codes C. P. sec. 139; Cobbe's Ann. Stats. of Nebr. sec. 1128.

² Rule XVI of the Circuit Court Rules for Wisconsin provides that money tendered must be paid into court and a certificate showing such payment served on the opposite party within five days after the pleading is served, or the tender becomes nugatory.

II. As to the residue of said claim, the defendant says that on the day of, 19.., at he tendered [*continue as in preceding form*].

1421. Denial of part, and tender of residue.

I. [*As in Form 1411 or 1412.*]

II. That before this action, and on the day of, 19.., at he tendered to the plaintiff dollars in payment of said sum; but he refused to receive the same.

III and IV. [*As in paragraphs II and III of Form 1419.*]

1422. Compromise.

I. That before the commencement of this action, the plaintiff having demanded said sum [*or said goods, or otherwise*] from the defendant, the defendant refused to pay the same, because [*here state facts showing the claim a doubtful one*].

II. That the parties thereupon agreed to compromise said claim, and that the defendant should pay, and the plaintiff accept dollars in satisfaction thereof.

III. That on the day of, 19.., in pursuance of said agreement, the defendant did pay and the plaintiff accepted said sum of dollars in full satisfaction of the plaintiff's said claim.

1423. Composition-deed.

I. The defendant admits that on the day of, 19.., he was indebted to the plaintiff as alleged in the complaint.

II. The defendant further says that afterwards, and on or about the day of, 19.., the plaintiff, by his deed under seal, agreed with the defendant that the plaintiff would accept twenty-five per cent. of his said claim, to-wit, the sum of dollars, then and there paid him by the defendant, in full satisfaction of said indebtedness, and that he would not sue the defendant on account thereof, and then and there did accept the same; and divers other creditors of the defendant then and there also, by the same deed, agreed to accept, and did accept, currently with the said plaintiff, the same percentage as that accepted by the plaintiff, in full satisfaction of the several debts to such creditors respectively due and owing from the defendant, and covenanted with the defendant not to sue the defendant for such respective debts

1424. Rescission of contract.

That on or about the day of, 19.., after the contract alleged in the complaint, and before any breach thereof,

it was agreed by and between the plaintiff and the defendant that the said contract should be waived, abandoned, and rescinded; and they then waived, abandoned, and rescinded the same accordingly.

1425. By surety, alleging an alteration of the contract.

I. That the defendant gave said bond to the plaintiff as surety for one M.... N...., to secure the performance, on the part of said M.... N.... of [*here state the principal contract briefly; or, if in writing, it may be annexed, and referred to as a part of the complaint*].

II. That thereafter, and without the knowledge or consent of this defendant, the plaintiff agreed with said M.... N.... [by writing under seal, *here state modification*].

1426. Traverse of plaintiff's general allegation of performance.

That the plaintiff has not duly performed all the conditions of said contract on his part, but, on the contrary [*here may be set forth particular breach, as in complaints; and if the provision broken does not appear in the complaint, it may be stated thus: although said contract contained a provision, of which the following is a copy: copy of contract*], the defendant did not, etc.

1427. Set-off.

The defendant, for a counter-claim herein, alleges that before, and at the time of the commencement of this action, the plaintiff was, and still is, indebted to the defendant in the sum of dollars, for the following cause: * [*here state the cause of action relied on as a set-off*], out of which said sum of money, so due to the defendant, he hereby offers to set off to the plaintiff so much as will be sufficient to satisfy the plaintiff's damages, if any, in respect to the alleged matters complained of [*or, if the cause of action in the complaint is admitted, say, sufficient to satisfy the sum so due to the plaintiff*].

1428. The same, by executors.

The defendant, for a counter-claim herein, alleges that the plaintiff before, and at the time of the death of the said M.... [*the defendant's testator*], was indebted to the said M.... [*or, was at and before the commencement of this action indebted to the estate of the said M....*], and still is so indebted to the estate of the said M.... in the sum of dollars for the following cause [*here state the cause of action relied on as a set-off; and conclude as in the preceding form from the **].

1429. The same, in an action by executors.

The defendant, for a counter-claim herein, alleges that the said M.... [*the plaintiff's testator*], before and at the time of his death, was indebted to the defendant [*or, if the executors-plaintiff were indebted in the representative capacity*, before and at the time of the commencement of this action, the plaintiffs, as the executors of M.... were, and still are, indebted to the defendant] in the sum of dollars, for the following cause [*continue as in preceding form*].

1430. That plaintiff has been adjudged a bankrupt.

That after the claim set forth in the complaint had accrued, and before this action, the plaintiff was duly adjudged a bankrupt in the United States district court for the district of, and one E.... F.... was by said court duly appointed and thereafter duly qualified as a trustee in bankruptcy for the plaintiff, and thereupon and pursuant to law all of the property of said plaintiff, including the claim alleged in the complaint, was and still is vested in said E.... F.... as such trustee.

1431. Discharge in bankruptcy.

I. The defendant alleges that on the day of, 19.., and for more than six months immediately prior thereto, he was a resident of the city of in the county of and state of, within the jurisdiction of the United States district court for the district of and that on said date he was insolvent and a bankrupt within the meaning of the act of Congress entitled "An Act to establish a Uniform System of Bankruptcy throughout the United States," approved July 1, 1898, and then and there owed debts which had not been created in consequence of fraud, embezzlement, misappropriation, or defalcation as a public officer, or as an executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity, and which he was unable to pay.

II. That on said day of, 19.., defendant filed in the district court of the United States for the district of a petition, wherein he set forth that for the greater portion of six months next immediately preceding the filing of his said petition, he had been a resident of the said city of within said judicial district, and that he owed debts which he was unable to pay in full; and wherein was set forth a list of his creditors and the places of their respective residence, and

that said debts were not created by his fraud, embezzlement, misappropriation or defalcation, while acting as a public officer or as an executor, administrator, guardian, or trustee, or in any fiduciary capacity; and wherein was also set forth an accurate inventory of all his property, both real and personal, including his rights, credits and effects of every kind and nature, which petition was duly verified by his oath, and wherein he prayed that he might be adjudged by said court to be a bankrupt within the purview of the act of congress aforesaid; and that such proceedings were thereafter had upon said petition that on the day of, 19.., this defendant was by said court duly adjudged a bankrupt.

III. That on the day of, 19.., the defendant filed in said court a petition praying that he might be discharged from all his debts, and that a certificate of such discharge might be issued to him, and that on the day of, 19.., notice was duly issued to all the creditors of defendant and all parties interested in said proceedings in bankruptcy, to appear in said court on the day of, 19.., and show cause why such discharge should not be granted.

IV. That on said day of, 19.., defendant having complied with all the requirements of the act of congress relating to bankruptcy, and all orders of the court, was declared by said court entitled to be discharged from his debts as prayed for, and a decree was duly made and entered by said court in said bankruptcy proceedings on said day of, 19.., that defendant be discharged from all debts and claims provable under said act of congress against his estate, and which existed on the day of, 19.., except such debts as are by law excepted from the operation of a discharge in bankruptcy, and a certificate of said discharge was duly issued to defendant, a copy of which is hereto attached and made a part hereof, marked Exhibit A.

V. That the cause of action which is the basis of the plaintiff's complaint was due and owing to plaintiff at the date of the filing of said petition to be declared a bankrupt, and upon the date of the said adjudication in bankruptcy, and was included in the schedule of debts owing by said bankrupt filed with the aforesaid petition. That said debt was a debt provable against the estate of this defendant in bankruptcy and was not a debt created by his fraud, embezzlement, misappropriation, or defalcation while acting as a public officer, or as an executor, administrator or guardian or trustee, or while acting in any other fiduciary capacity.

1432. Discharge under state insolvency law (Chap. 80 Wis. Stats. 1898).

I. The defendant alleges that on the day of, 18.., he was a resident of the city of in the county of, in said state, and was insolvent, within the meaning of Chapter 80 of the statutes of the state of Wisconsin for the year 1898; and that on said day he made, executed and delivered to one G.... H...., then a resident of said state, a voluntary assignment of all his property, real and personal, for the benefit of and in trust for his creditors; that before taking upon himself the trusts conferred upon him by said assignment, the said G.... H.... delivered to the county judge of county his bond, with two sufficient sureties, duly executed and conditioned according to law, in the sum of dollars, being a sum greater than the whole amount of the nominal value of the assets of the defendant so assigned, which bond was duly approved according to law. That the said assignee G.... H...., was not and is not a creditor of this defendant, that he duly consented in writing to take upon himself the faithful discharge of the several trusts specified in said assignment; that a full and true copy of said assignment, indorsed with such consent, was presented to the said county judge and certified by him to be a true copy of the original assignment, and of the whole thereof, and thereupon the said copy of said assignment, together with the said bond, were duly filed in the office of the clerk of said court of county, and said county judge having first indorsed upon said copy of said assignment his further certificate that the said assignee did in his presence indorse upon the same his consent, as provided by section 1696 of said statutes, and that all the proceedings required by law, and especially by chapter 80, were duly had and taken.

II. That within twenty days after the execution of the said assignment this defendant made and filed in the office of the clerk of said court a correct inventory of his assets, and a list of his creditors, stating the place of residence of each creditor and the amount due to each, which inventory and list were each verified by the oath of the defendant and had affixed thereto a certificate of the said G.... H.... that the same were correct to his best knowledge and belief, and that the name of the plaintiff, with his place of residence and the amount due to him upon the claim set forth in the complaint was included in said list; that within twenty-two days after the execution of said assignment, as this defendant is informed and believes, the said G.... H.... as assignee aforesaid, gave notice of the making of said

assignment, and of the post office address of said assignee, and that every creditor of the said defendant was required to file, within three months, with said assignee or the clerk of said circuit court, naming him and giving his post office address, on pain of being debarred of dividend, an affidavit setting forth his name, residence and post office address, and the nature, consideration and amount of his debt, over and above all off-sets; that such notice was given by publishing the same once in each week for three successive weeks in a newspaper, to-wit, the Q.... Z.... in the said county of and by mailing a copy of said notice to each creditor of the defendant at his residence of whom the said assignee had information, and that a copy of said notice was duly mailed to the plaintiff.

III. That at the expiration of three months from the first publication of said notice, and on the day of, 19.., said assignee filed with the clerk of said court due proof of publication of the same, with a list of the creditors to whom such notice was mailed, with the dates thereof, respectively, verified by his affidavit, and also a list of the creditors from whom affidavits of claims had been received by himself or said clerk, stating the names, residences, and amounts claimed, respectively, together with all affidavits of claims by him received.

IV. That this defendant, desiring to be discharged from his said debts, did within one year after the filing of the copy of his assignment in the office of the clerk of the circuit court as aforesaid, and before the final settlement of the accounts of said assignee, file in the office of the clerk of said circuit court, and did present to said circuit court his application for discharge from his debts, addressed to said court, in which application he stated the date of the filing of such assignment in the clerk's office where the same was filed, with name and post office address of the said claim and of the assignee named in such assignment, which application was signed by this defendant and had annexed thereto his affidavit subscribed and sworn to by him, as required by section 1702c of said chapter 80 aforesaid.

V. That upon the filing of said petition as aforesaid, such proceedings were thereafter taken thereon that this defendant was by the said court, by an order and judgment duly made and entered by said court on the day of, 19.., duly discharged from all his debts and liabilities existing at the time of the making of said assignment, to-wit, on the day of, 19.., and from each and every one of the said debts and liabilities, a copy of which order and judgment is hereto annexed marked Exhibit A and made part of this answer.

VI. That thereupon the clerk of the said court did immediately enter judgment on the judgment docket thereof against this defendant in favor of each of his said creditors, including the plaintiff, for the amount of his said claim or debt against this defendant, and also entered and discharged all said judgments upon the said docket by the order of said court.

WHEREFORE defendant demands that the complaint of the plaintiff be dismissed.

1433. Payment by delivery of property.

That before the commencement of this action, and on or about the day of, 19.., it was agreed between the plaintiff and defendant that the defendant should turn over and deliver to the plaintiff one certain horse, the property of the defendant [*or transfer and assign to the plaintiff one certain promissory note executed by M.... N...., describe note, the property of defendant, or otherwise describe the property according to the facts*], and that the plaintiff should receive the said [*horse or other property*], in full payment and satisfaction of the plaintiff's claim against the defendant described in the complaint, and that in accordance with said agreement the defendant did on the day of, 19.., deliver to the plaintiff said horse [*or assign and deliver to the plaintiff said note*], whereby the said plaintiff's claim became fully paid, satisfied and discharged.

CHAPTER XCI.

DEFENSES IN ACTIONS FOR MONEY HAD AND RECEIVED.

- | | |
|--|--|
| 1434. Denial of loan. | 1437. Denial of request to pay money to another. |
| 1435. Allegation of payment by sale of collateral. | 1438. Usury. |
| 1436. Denial of receipt of money. | 1439. Accounting and payment. |

1434. Denial of loan.

This defendant denies that the plaintiff, on the day of, 19... [*date mentioned in the complaint*], or at any other time, loaned to the defendant the money described in the complaint, or any part thereof.

1435. Allegation of payment by sale of collateral.

The defendant alleges that on or about the day of, 19... , he delivered to the plaintiff [*describe the property*], as collateral security for the repayment of the said loan [*or, to indemnify the said plaintiff against all liability arising from the execution of the undertaking*], described in the complaint, and that on or about the day of, 19... , the plaintiff sold the said [*describe collateral*], and realized upon such sale and still retains the sum of dollars, which sum is greater than the amount of said loan [*or, the amount paid by the plaintiff upon said undertaking*], with interest thereon up to the time of such sale. [*If the amount received be less than the plaintiff's claim, state the fact as a partial defense.*]

1436. Denial of receipt of money.

This defendant denies that at the times named in the complaint, or at any other time, he received the money mentioned in said complaint, or any part thereof.

1437. Denial of request to pay money to another.

I. This defendant denies that he at any time requested the plaintiff to pay any money to said [*naming the person to whom, or object for which, the payment is alleged to have been made*].

II. This defendant denies that he at any time promised to pay any money to the plaintiff on account of any money paid to the said M.... N....

1438. Usury.

That the loan alleged in the complaint was made to the defendant by the plaintiff on the corrupt and unlawful agreement between them, that the plaintiff should reserve and secure to himself, and the defendant would pay to him, for the use of said sum, a greater sum than at the rate of [seven] per centum per annum, to-wit [*here state the interest or compensation agreed on; and payment of it, if it has been paid*].

1439. Accounting and payment.

That on the day of, 19.., this defendant accounted with and paid over to the plaintiff all moneys received by this defendant, up to that day, as such agent of the plaintiff.

CHAPTER XCII.

DEFENSES IN ACTIONS FOR GOODS SOLD.

1440. Denial of necessities.

1441. Allegation that credit is unexpired.

1442. Denial of plaintiff's title.

1443. That plaintiff agreed to take note in part payment.

1444. Counter-claim for breach of warranty.

1445. Counter-claim by way of set off against plaintiff's factor.

1446. Payment in part, and deficiency in the goods exceeding the balance, with counter-claim for excess.

1440. Denial of necessities.

The defendant denies that the articles mentioned in the plaintiff's complaint, or any part thereof, were furnished to the defendant's said wife [*or child*] with the knowledge or consent of this defendant, and denies that the same, or any part thereof, were necessary for the use of said wife [*or child*].

1441. Allegation that credit is unexpired.

The defendant alleges that said sale was upon a credit of months from the day of, 19.., which time had not expired at the commencement of this action.

1442. Denial of plaintiff's title.

The defendant denies that the goods, wares, and merchandise mentioned in the complaint, or any part thereof, were ever sold by the plaintiff to this defendant, and alleges that no part of the said goods, wares, and merchandise was the property of the plaintiff when sold to this defendant; but the same then were the property of one M.... N...., who sold the same to this defendant.

1443. That plaintiff agreed to take note in part payment.

I. That the said goods were sold and delivered to the said defendant by the said plaintiff on an express agreement, by and between them, that the said plaintiff should accept in part payment therefor, to the extent of dollars, a promissory note for that sum drawn by this defendant [*or, by one M.... N....*], and dated on the day of, 19.., and payable on the day of, 19.. [*with an approved indorser*]; and the residue, ... dollars, in cash.

II. That on the day of, 19.., and before this action, the defendant tendered to the plaintiff such a note as above described [indorsed by one O.... P...., who was then, and still is, a merchant at, in good credit and ability, and an approved indorser], and is still ready and willing to deliver the same.

III. That the defendant refused to receive the same.

IV. As to the residue, ... dollars, the defendant alleges [*allege payment or tender, as in forms in chapter XC*].

1444. Counter-claim for breach of warranty.

The defendant, for a counter-claim herein, alleges that at the time of the sale of the said goods in the complaint mentioned, the said plaintiff represented and warranted that [*here state the warranty claimed and allege breach and damage following substantially the forms given in chapter XLIV of this work, with such changes as may be necessary, and close with demand for judgment*].

1445. Counter-claim by way of set-off against plaintiff's factor.

I. The defendant, for a counter-claim herein, alleges that the goods mentioned in the complaint were, with the privity of the plaintiff, sold and delivered to the said defendant by one M.... in his own name as the sole owner, and as and for his own goods.

II. That said M.... was in fact the agent and factor of the plaintiff in respect to said goods.

III. That the plaintiff did not appear, and was not known by the defendant at or before the time of the sale and delivery to be the owner of the goods, or in any way interested therein.

IV. That the defendant bought and accepted the goods of and from M.... as the true and sole owner and seller; and that credit for the said goods was given to the defendant by the said M...., and not by the said plaintiff.

V. That the said M...., before and at the time of the sale and delivery of the said goods was, and still is, indebted to the defendant for the following cause [*continue as in Form 1427 from the **].

[*Demand for judgment.*]

1446. Payment in part, and deficiency in the goods exceeding the balance, with counter-claim for excess.

I. For a counter-claim, the defendant alleges that the plaintiffs have brought this action, as defendant is informed and be-

lieves, to recover a balance claimed to be due for mirrors and other articles furnished to, and for work and labor done for, this defendant by the plaintiffs, on various days between the day of, 19.., and the day of, 19..; that the total amount of the account of said mirrors and other articles, and said work and labor, as made out and presented by the plaintiffs, was the sum of dollars.

II. That the defendant paid to the plaintiffs from time to time various sums of money on account of said mirrors and other articles, and work and labor, amounting in all to the sum of dollars, and redelivered to said agent certain articles, to-wit [*describe the articles*], of the value of dollars.

III. That it was agreed between this defendant and the plaintiffs that all mirrors furnished to the defendant should be perfect and true mirrors, and in every way satisfactory to the defendant; and that if any of them upon trial should prove to be untrue or imperfect, the same should be taken back by the plaintiffs, and others substituted in their stead.

IV. That among the articles furnished by the plaintiffs to this defendant under said agreement, and included in said account was one pier-glass, three mantel mirrors, and four gilt cornices, which were charged in gross in said account, at the price of dollars. That the said three mantel mirrors above mentioned proved, upon examination and trial, to be untrue and imperfect; that they were entirely unsatisfactory to this defendant; that he promptly notified the plaintiffs of the deficient and unsatisfactory quality and character of said mirrors, and requested them to take them away, and replace them with true and perfect mirrors; but they have never complied with the request of this defendant in this regard. That the defendant has at all times been, and still is, ready to redeliver said mirrors to said plaintiffs. That the same, if true, perfect, and satisfactory, would have been worth about the sum of dollars, at the price that such mirrors were to have been furnished, under the agreement between the plaintiffs and this defendant; but that they were worth at least dollars less, on account of their deficient character. And the defendant claims that the deficiency in value of said mirrors, to-wit, the sum of dollars, should be deducted from said account.

WHEREFORE, the defendant demands that the said sum of dollars be allowed and adjudged as due this defendant upon this counter-claim, and that he have judgment against the plaintiffs for the excess thereof over and above the plaintiffs' claim herein, and that he recover his costs of this action.

CHAPTER XCIII.

DEFENSES IN ACTIONS FOR SERVICES.

1447. Accounting and payment.

1448. Counter-claim against carrier for negligence.

1449. Plaintiff's work not finished, and architect's certificate not obtained.

1447. Accounting and payment.

I. The defendants deny each and every allegation in said complaint, except what is hereinafter admitted.

II. The defendants, admitting that said plaintiff did, at the request of defendants, enter into the service of the defendants as [salesman], as stated in the complaint allege that they did account with said plaintiff on the day of, 19...; and that on said accounting there was found due said plaintiff only the sum of dollars.

Second. For a further defense, the defendants allege that before the commencement of this action they paid to said plaintiff said sum of dollars, so found due upon the accounting hereinbefore alleged, in full of the plaintiff's claims.

1448. Counter-claim against carrier for negligence.

The defendant, further answering and by way of counter-claim herein, alleges: that the transportation of the goods mentioned in the complaint was conducted so badly and negligently, and with so little care, that by the mere carelessness, negligence, and improper conduct of the said plaintiff and his servants in that behalf, a part of the said goods, of the value of at least dollars, were wholly lost to the defendant; and a part thereof, of the value of dollars, were damaged in the sum of dollars; which said loss and damages, amounting to the sum of dollars, the defendant claims the right to counter-claim and set off against the plaintiff's demand to the extent thereof; and the defendant demands judgment against said plaintiff for the said sum of dollars, or so much thereof as he may be entitled to over and above the plaintiff's claim.

1449. Plaintiff's work not finished, and architect's certificate not obtained.¹

I. The defendant alleges that the said labor and services set forth in the complaint were performed by the said plaintiff in and about the execution and construction of a certain dwelling house, the property of this defendant, and were performed under the terms of a certain written contract between plaintiff and defendant, by the terms of which it was provided [*here set forth provisions of contract relied on*].

II. That the said work was not completed in a good and workmanlike manner, on or before the day limited therefor in the said contract, but on the contrary, the said work on that day, and from thence to the commencement of this action, was and still is, incomplete and unfinished, in this [*here state particulars*].

III. That no certificate from the said architect, that the said work had been completed to his satisfaction, was obtained by the plaintiff before this action.

¹ Where the plaintiff sets forth the contract and pleads due performance of its conditions, failure to fully complete the work and obtain the architect's certificate will probably be admissible

under a general denial, but if the action be simply brought to recover for services it will be necessary to set out the contract and plead the breaches as in this form.

CHAPTER XCIV.

DEFENSES IN ACTIONS ON BILLS, NOTES AND CHECKS.

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|---|--|
| <p>1450. Denial of execution or acceptance.</p> <p>1451. Denial of genuineness of signature.</p> <p>1452. Denial of indorsement.</p> <p>1453. Denial of plaintiff's ownership.</p> <p>1454. That defendant indorsed as agent only.</p> <p>1455. Mistake in amount of note.</p> <p>1456. Alteration of the instrument.</p> <p>1457. Usury in making note.</p> <p>1458. The same, another form.</p> <p>1459. The same, another form, where tender of principal is necessary, and interest only is forfeited.</p> <p>1460. Usury, where interest only is forfeited.</p> <p>1461. Want of consideration.</p> <p>1462. Failure of consideration.</p> <p>1463. That the acceptance was for accommodation.</p> <p>1464. That the note was for accommodation, and was misapplied.</p> <p>1465. That the note or acceptance was given for goods sold, but never delivered.</p> <p>1466. That the notes were given for purchase-money, and plaintiff failed to convey.</p> <p>1467. That the note was for goods sold by means of deceit.</p> <p>1468. That the note was for goods sold with a false warranty.</p> <p>1469. Counter-claim for breach of warranty.</p> <p>1470. That the note was given on a purchase of diseased</p> | <p>sheep and that they injured other sheep of the defendant.</p> <p>1471. That the note was induced by plaintiff's fraud, general form.</p> <p>1472. Denial of transfer to the plaintiff.</p> <p>1473. Qualified admission of note, and denial of plaintiff's title.</p> <p>1474. Wrongful transfer by partner.</p> <p>1475. Denial of validity of transfer of note by moneyed corporation.</p> <p>1476. By accommodation indorsers, alleging extension given to makers.</p> <p>1477. That defendant was a surety, and that plaintiff holds collateral securities to which defendant asks to be subrogated.</p> <p>1478. Denial of acceptance, presentment, and protest.</p> <p>1479. Denial of notice.</p> <p>1480. Denial of presentment.</p> <p>1481. Denial of excuse for non-presentment.</p> <p>1482. Breach of special agreement as to presenting and giving notice.</p> <p>1483. Payment of bill, to drawer, before indorsement.</p> <p>1484. Fraudulent representations as to character of the instrument.</p> <p>1485. That note was given to compound a felony.</p> |
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1450. Denial of execution or acceptance (see following form).

The defendant denies that he [*or E.... F....*] at any time executed or delivered the promissory note [*or accepted the bill of exchange*] set forth in the complaint.

1451. Denial of genuineness of signature.¹

The defendant specifically denies that he at any time signed or executed the said supposed promissory note set forth in the complaint herein, and alleges that if the name of this defendant appears upon said promissory note, either as maker or indorser, the said signature is a forgery.

[*Verification.*]

1452. Denial of indorsement.

The defendant denies that he [*or E.... F....*] at any time indorsed or delivered the promissory note [*or bill of exchange*] described in the complaint herein.

1453. Denial of plaintiff's ownership.

The defendant denies that the promissory note described in the complaint is owned or held by the plaintiff, and denies that the same was so owned or held at the time of the commencement of this action, and on the contrary thereof this defendant alleges that the said note was then and is now the property of and held by one E.... F....

1454. That defendant indorsed as agent only.

I. The defendant denies that he ever indorsed the promissory note described in the complaint in his individual capacity, and denies that he ever placed his name thereon in any manner, save as hereinafter particularly stated.

II. This defendant says that the following is a true copy of the promissory note made by the said firm of A.... & Co., and on which this action is brought [*copy of note and indorsement, with addition of "Treasurer" to defendant's signature*].

III. That at the time of the making and indorsement of said note this defendant was the treasurer of the company, at, a foreign corporation, duly incorporated by and under the laws of the state of; and that he was authorized by them to receive the said note, and to indorse the same to the

¹ There are statutes in a number of states providing substantially that unless a defendant specifically deny by affidavit or verified pleading the signature to a contract which is sued on, the mere production of the instrument is *prima facie* evidence of its execution. Under these statutes it has been frequently held that a

verified general denial is insufficient to throw the burden of proof on the plaintiff. *Cowing v. Peterson*, 36 Minn. 130. The form here given is adapted from the answer which was held sufficient in *Ludlow, et al., v. Berry*, 62 Wis. 78. See Wis. Stats. 1898 sec. 4192; Minn. Rev. Laws 1905 sec. 4730; Iowa Code sec. 3640.

plaintiffs, as such treasurer, of all which facts the plaintiffs had notice.

IV. That said corporation was, at the time of said indorsement, indebted to the plaintiffs to the amount of about dollars, for goods, wares, and merchandise, furnished by the said plaintiffs to the said corporation; and said note was received and indorsed by him as such treasurer, and not in his individual capacity, and was received by the plaintiffs as an obligation of the said corporation, on account of said precedent debt due to them from the said corporation; and for and on account of no other consideration whatever, and that he received no consideration therefor.

1455. Mistake in amount of note.

That said note was given upon a settlement of account between the defendant and the plaintiff, and was intended by them to be made and received for the sum of dollars, then claimed by the plaintiff to be the amount due him from this defendant; but that when it was made, it was, by mistake of the parties, given for the sum of dollars mentioned in the complaint, instead of the sum of dollars, which was all that was due; and as to the excess, to-wit, ... dollars, the same is without consideration.

1456. Alteration of the instrument.

That after the making [*or acceptance*] and issue of said note [*or bill*] and before this action, the plaintiff materially altered the said note [*or bill*] without the consent of the defendant, by adding the signature of M.... N.... as a joint maker thereof [*or by cutting off the signature of M.... N...., who was a joint maker thereof, or by adding the words "payable at, " or otherwise, as the case may be*].

1457. Usury in making note.²

I. That the note mentioned in the complaint was made and delivered to the plaintiffs upon the usurious agreement between the defendant and the plaintiffs, that the defendant should pay

² The defense of usury cannot be raised under a general denial; the facts of the supposed usurious agreement must be specifically pleaded. And when a foreign usury statute is relied on the foreign law must be set out, and also

the facts which show that the agreement was governed by that law and void under it. Curtis v. Masten, 11 Paige (N. Y.) 15.

In Minnesota usurious contracts are wholly void, except negotiable instruments in the hands of a

the plaintiffs, and that the plaintiffs should reserve and secure to themselves, for the loan of money, a greater sum than at the rate of per cent, per annum, to-wit, at the rate of per cent. per annum [besides a commission of per cent, on the face of said note].

II. That said sum was deducted and reserved from the amount of said note by the plaintiffs, and the balance only paid to this defendant; that is to say, that this defendant agreed to pay, and the plaintiffs agreed to receive dollars for said loan, the plaintiffs reserving and securing to themselves for the loan of money on said note, until the maturity thereof, ... dollars.

[The foregoing may be sufficient in states where, as in Minnesota, usurious contracts are invalid, but where, as in other states covered by this work, the principal may be recovered and the interest alone becomes forfeited there should be added another paragraph, as follows:]

III. The defendant admits that there is due and owing to the plaintiff upon said note the sum of dollars [*principal sum*]. [*In Wisconsin insert: and upon the trial of this action will prove a tender of said last named sum to the said plaintiff*] but defendant specifically denies that any greater sum than said sum of dollars is due the plaintiff upon said note.

1458. The same, another form.

That he gave to the plaintiff the note mentioned in said complaint, in pursuance of a mutual agreement between the plaintiff and defendant, that the plaintiff should lend the defendant the sum of dollars from the day of, 19.., until the day of, 19.. [*or until demand*], upon interest at the rate of per cent, per annum [*or cents per day on each one hundred dollars*].

II. That the defendant received from the plaintiff dollars only, as consideration for the said note; the plaintiff retaining dollars, as interest thereon.

[See note to last preceding form.]

bona fide holder. Minn. Rev. Laws 1905 sec. 2735. In the remaining states covered by this work the interest only is forfeited but the principal may be recovered. Wis. Stats. 1898 secs. 1690-1692; Wis. Laws 1905 c. 278; Iowa Code sec.

3041; N. Dak. Rev. Codes sec. 4066; S. Dak. Rev. Codes, C. C. sec. 1419; Cobbey's Ann. Stats. of Nebr. sec. 6729. In Wisconsin a tender of the principal sum must be shown in order to entitle the defendant to any relief.

1459. The same, another form, where tender of principal is necessary, and interest only is forfeited (Wisconsin).

As a partial defense to this action the defendant alleges:

I. That before the making of the said promissory note described in the plaintiff's complaint, it was usuriously and corruptly agreed that the plaintiff should lend to the defendant the sum of dollars, and that the defendant should pay the plaintiff, and that the plaintiff should receive for the loan of said money a greater sum than at the rate of ten dollars on one hundred dollars, for one year, to-wit, at the rate of dollars on one hundred dollars for one year.

II. That in pursuance of said agreement the plaintiff delivered to the defendant on said loan, only the sum of dollars; and thereupon the defendant executed and delivered to the plaintiff the promissory note described in the complaint.

III. That by the terms of the statute this defendant is entitled to be relieved from said contract upon payment of the said sum of dollars [*principal sum*], which sum this defendant duly tendered to the plaintiff prior to the commencement of this action, to-wit, on the day of, 19.., and now brings into court for the use of the plaintiff if he will receive it.

1460. Usury, where interest only is forfeited.

As to the sum of dollars, parcel of said sum of dollars, in said complaint demanded, the said defendant admits that he owes the said sum of dollars to the said plaintiff; but as to the sum of dollars, the residue of the said sum of dollars, the said defendant says the said promissory note in the complaint mentioned, was given by the said defendant to the said plaintiff for the loan of dollars for years, and no more and that the said sum of dollars was included in said note, as interest on the said sum of dollars for the said term of years, at the rate of per cent, per annum.

1461. Want of consideration.

I. The defendant admits that he made the promissory note as stated in the complaint, that the same was indorsed by the payee, and that the plaintiff is the lawful owner and holder thereof, and that no part thereof has been paid.

II. But defendant alleges, on information and belief, that the plaintiff became the purchaser, holder, and owner of said note, on or about the day of, 19.., and after the same had become due.

III. And defendant alleges that said note was made, executed, and delivered by the defendant, in consideration of the sale and assignment to him of a certain instrument in writing, to-wit [*here describe the instrument or the property and allege its worthlessness. It must be absolutely worthless to sustain the defense*].

1462. Failure of consideration.

I and II. [*As in last preceding form.*]

III. Defendant alleges that said note was made and delivered by the defendant to the plaintiff as the purchase price of a certain horse [*or certain goods and merchandise*] which the plaintiff on the day of, 19.., sold and delivered to this defendant, and not otherwise.

IV. That in truth and in fact the said plaintiff did not own the said [*describe property*] at the time of such pretended sale and delivery, but the same was then the property of E.... F...., who thereafter and on the day of, 19.., recovered the same from this defendant by a judgment duly given in his favor in an action of replevin.

V. That defendant has received no consideration for the said note.

1463. That the acceptance was for accommodation.

I. That he accepted the bill mentioned in the complaint for the accommodation of the plaintiff [*or, of said M.... N....*]; and that there was never any value or consideration for the acceptance or payment of said bill by the defendant.

[*Where plaintiff is an indorsee, add: II. That the same was indorsed to the plaintiff, and he always held the same, without any value or consideration.*]

1464. That the note was for accommodation, and was misapplied.

I. That the note mentioned and described in the complaint was given by this defendant to [*the payee*] therein named, without any other consideration than is hereinafter stated.

II. That theretofore this defendant had loaned his promissory note for dollars, dated on the day of, 19.., to said [*payee*] without consideration, and solely for the accommodation of said [*payee*] and upon his promise to take up and pay the same at maturity.

III. That said note fell due on the day of, 19.., and that at the request of said [*payee*], this defendant then gave him the note in suit, for the special purpose of en-

abling him therewith to take up and renew said first note of dollars, he paying the balance, and upon the agreement with him that it should be so used, and not otherwise.

IV. That the plaintiff having a claim then over-due against the said [payee] the said [payee] wrongfully diverted said note from the purpose for which it was given, and fraudulently mis-applied the same by giving it to the plaintiff as collateral to secure the payment of said claim.

V. That the plaintiff is not the *bona fide* holder of the note in suit for a valuable consideration; but received the same with notice of the foregoing facts, and as collateral to secure the payment of an antecedent debt, and without paying any consideration therefor.

VI. This defendant denies each and every allegation of the complaint, not hereinbefore admitted.

1465. That the note or acceptance was given for goods sold, but never delivered.

I. That the bill [*or* note] mentioned in the complaint was accepted [*or* given by the defendant for the price of goods to be sold and delivered by the plaintiff to the defendant before the said bill [*or* note] should become due.

II. That defendant has always been ready and willing to buy and accept said goods from the plaintiff, and has duly performed all the conditions on his part.

III. That the plaintiff has not sold and delivered the same to the defendant [though the defendant, on the day of, 19.., at duly requested him so to do].

IV. That except as aforesaid there never was any consideration for the acceptance or payment of said bill [*or*, giving or payment of said note] by the defendant.

1466. That the notes were given for purchase-money, and plaintiff failed to convey.

I. That the only consideration of the said three several notes as and is the sale of a certain piece of land, situate in the county of and state of, and known and described as [*description*].

II. That at the time of making said several promissory notes, the said plaintiff agreed to convey the said premises to this defendant, at the time when the sum named in the note described in the first count of the said complaint should become due and payable, to-wit, on the said day of, 19..; and take a mortgage from this defendant on said premises, to secure the

payment of the sums mentioned in the two notes described in the second and third counts of the said complaint.

III. That the defendant duly performed all the conditions of said agreement on his part, and on said day, and ever since has been ready and willing to pay the first-named sum, and execute and deliver said mortgage, on the delivery by the said plaintiff of such deed of conveyance.

IV. That said plaintiff did not, on the said day of, 19.., nor at any time since, offer to convey the said premises to the said defendant, on the payment of the sum mentioned in the said first note, and the execution of a mortgage by the said defendant as aforesaid, to secure the sums of money mentioned in the two other notes [*or, if by the agreement it was necessary, allege demand and refusal*].

1467. That the note was for goods sold by means of deceit.

I. [*Allege sale as in the case of an action for damages for deceit, Chap. XLV, ante, omitting at the end the allegation of damage and demand for judgment.*]

II. That said note was given to the plaintiff without any other consideration than said [sale].

III. That immediately on discovering said fraud, the defendant rescinded said [contract], and delivered [*or tendered*] to the plaintiff all that the defendant had received under said contract, upon condition of his returning said note, which the plaintiff refused to do.

1468. That the note was for goods sold with a false warranty.

I. That the defendant gave the note mentioned in the complaint for and on account of certain goods, called, therefore furnished by the plaintiff to him, the defendant, under a representation and warranty by the plaintiff, at the time of so furnishing them, made to the defendant, that the said goods were fit and proper material for [*stating the warranty*] and suitable for such purpose; and for no other consideration whatever.

II. That the defendant then accepted and purchased said goods for the purpose of trusting in the said representation and warranty of the plaintiff; all of which the plaintiff then well knew.

III. That the same were not fit or proper for said purpose, but altogether unsuitable and worthless, in this, that [*here state particularly the defects*].

1469. Counter-claim for breach of warranty (adapted from Allen v. Haskins, 5 Duer, 332).

I. The defendant, for a counter-claim herein, alleges that the said note was not, before it became due, transferred and delivered to the plaintiff for value.

II. That the said note was made and delivered by the defendant to one M.... N...., who was at that time an agent or servant of the plaintiff, and acting as such on behalf of the plaintiff in that transaction, in exchange for a quantity of cigars; which was sold by sample to the defendant at that time, by said M.... N...., as such agent.

III. That when said cigars were delivered to this defendant, they did not correspond with the samples, and were not worth more than dollars.

IV. That as soon as the defendant learned the character of said cigars, he offered to said M.... N...., as such agent, to return them, which he is still ready and willing to do.

WHEREFORE the defendant demands judgment for his damages herein, to-wit, the sum of dollars, and that the same be deducted from the amount of the said note.

1470. That the note was given on a purchase of diseased sheep and that they injured other sheep of the defendant (Rose v. Wallace, 11 Ind. 112).

I. The defendant, for a counter-claim, alleges that the said note was given for sheep purchased by the defendant of the plaintiff.

II. That the plaintiff, in making said sale, represented himself to the defendant as a dealer in sheep, and acquainted with their diseases, and that the said sheep were sound and free from disease.

III. That defendant was ignorant of the disease called foot-rot; and that he purchased said sheep, relying upon the said representations of the said plaintiff.

IV. That in fact the sheep were not sound and free from disease, but were diseased with the foot-rot, which is contagious.

V. That the defendant was then the owner of five thousand other sheep, with which he desired those he purchased of plaintiff to run; of all of which the plaintiff had notice at the time of making the said sale.

VI. That before he had any knowledge that the sheep so purchased were diseased, and while they were running with his other sheep, the latter became diseased with said foot-rot from so running together; and that he has been thereby compelled

to expend dollars in their cure and endeavoring to cure them, and been damaged by reason of allowing said sheep to run with his other sheep, to the amount of dollars.

WHEREFORE, etc. [*demand of judgment for damages sustained.*]

1471. That the note was induced by plaintiff's fraud, general form.

I. That the plaintiff induced him to make the note mentioned in the complaint, by representing that [*here state specifically the false representation of fact*].

II. That the said representation was false, and known to be false by the plaintiff, and made with intent to deceive and defraud this defendant.

III. That the defendant believed said representation to be true, and relied thereon, and so relying did make and deliver to the plaintiff the said note mentioned in the complaint.

[*Allege return of property received, if any, and rescission.*]

1472. Denial of transfer to the plaintiff.

That the said note was made and indorsed by the defendants, and by them delivered to one M.... N.... a person other than the plaintiff, with whom defendants had business transactions; and defendants deny that they have any knowledge or information sufficient to form a belief whether or not said note was thereafter duly transferred and delivered by the lawful, or other, holders thereof to the plaintiff; and the defendants further deny that they have any knowledge or information sufficient to form a belief whether or not the plaintiff is the lawful owner and holder of said note.

1473. Qualified admission of note, and denial of plaintiff's title (Smith v. Mead, 14 Abbott's Pr. 262).

I. Defendants admit that heretofore they executed and delivered a promissory note to the plaintiff; but deny that the description of said note in the complaint is a true description of said note, or correctly states the terms thereof.

II. Defendants, further answering, deny [knowledge or information sufficient to form a belief] that the plaintiff is now, or was at the commencement of this action, the lawful and *bona fide* owner and holder of said promissory note, or has any interest whatever therein; and the defendants allege, on information and belief, that before this action said plaintiff sold and delivered said note for a valuable consideration to one John

Doe, who is, and at the commencement of this action was, the lawful owner and holder of said note.

1474. Wrongful transfer by partner (Kerneys v. Richards, 11 Barb. 312).

That the note alleged was not indorsed by M.... N.... & Co., but that it was indorsed in the name of said firm by B...., and by him transferred to the plaintiffs in payment of an individual debt of said B...., and without the knowledge or consent of said A...., his partner, and that the plaintiffs at the time of the said transfer had full knowledge thereof.

1475. Denial of validity of transfer of note by moneyed corporation (Smith v. Hall, 5 Bosw. 319).

I. That said corporation did not indorse said note to the plaintiffs, but the alleged transfer thereof was the act of some officer, or officers, of said corporation, unauthorized in any manner by the board of trustees.

II. That said transfer was made when the said corporation was insolvent, to the knowledge of the plaintiffs, for a prior indebtedness of the corporation, with intent to give a preference to the plaintiffs over other creditors of the corporation, and that the plaintiff was at the time one of the trustees of the said company.

1476. By accommodation indorsers, alleging extension given to makers.

I. That said note was indorsed by the defendants without consideration, and for the accommodation of the defendant Z...., the maker thereof.

II. That the plaintiffs, at the time they received said note, had notice thereof.

III. That about the time of its maturity, the plaintiffs, for a valuable consideration, and without the knowledge or assent of these defendants, made an agreement with said [maker] whereby they agreed to extend the time for the payment of said note by said [maker] days.

1477. That defendant was a surety, and that plaintiff holds collateral securities to which defendant asks to be subrogated (Bank v. Hunter, 4 Bosw. 646).

I. The defendant, for a counter-claim, alleges that said draft was accepted by the defendant without any consideration, for the accommodation of said [drawers], which the plaintiff well knew.

II. That the same was made under an agreement between said [*drawers*] and the plaintiff, whereby said [*drawers*] executed to the plaintiff a bond for dollars, together with a mortgage on house and lot No., ... street, in, as security for the payment thereof, which securities the plaintiff still holds, and are ample to secure and satisfy the plaintiff's demand.

III. That said [*drawers*] are insolvent and unable to pay said acceptance, and the defendant has no recourse for the payment or security of the sum for which he is liable to the plaintiff, except the said mortgages and securities held by the plaintiff.

IV. That the defendant has offered to pay the said draft, with interest and costs, if the plaintiff will surrender and transfer to the defendant upon such payment, the mortgages and securities held by the plaintiff; which the plaintiff refuses to do, but claims to hold said securities for some other demand due to the plaintiff from said [*drawers*].

V. That the plaintiff is a foreign corporation, created and doing business in the state of, and the defendant will be remediless under the laws of the state of, where the defendant resides, except by the aid and interposition of this court.

WHEREFORE the defendant demands that upon his paying said draft, with interest and costs, the plaintiff be adjudged to transfer said bond and mortgage to the defendant [and that he may hold and enforce them for his reimbursement, with interest].

1478. Denial of acceptance, presentment, and protest.

The defendant denies that the bill of exchange mentioned in plaintiff's first cause of action was presented for acceptance, or was accepted as alleged, or was presented for payment, or was protested for non-payment, or that payment was refused, as alleged in said complaint.

1479. Denial of notice.

The defendant denies that notice of the dishonor of the said promissory note [*or bill*] was given to the defendant, as alleged in the complaint herein.

1480. Denial of presentment.

The defendant denies that the promissory note [*or bill of exchange*] mentioned therein, was ever presented for payment [*or*

for acceptance] to him [or to M.... N....] as alleged in said complaint.

1481. Denial of excuse for non-presentment.

The defendant denies that due search was made when the said bill of exchange [or promissory note] became due and payable, to discover the residence and person of the said E.... F...., at or elsewhere, in order that the said bill might be presented to the said E.... F.... for payment, as alleged in said complaint.

1482. Breach of special agreement as to presenting and giving notice.

I. That the bill of exchange [or check] in the said complaint mentioned, was by the said defendant delivered to the said plaintiff, and by him discounted for the said defendants, upon the express condition and understanding that the plaintiffs should cause the same to be presented to the respective drawers thereof for acceptance or payment, and acceptance or payment thereof to be demanded as soon after the delivery thereof as the same could be done by the exercise of reasonable diligence in that behalf; and that in case of the non-acceptance or non-payment thereof by the respective drawees, on presentation or demand, immediate notice of such non-acceptance or non-payment should be given to the defendants by telegraph, or that the said defendants should not be bound or liable to pay the said bill of exchange.

II. That the said plaintiff failed to comply with the condition or understanding aforesaid, and did not present the said bill of exchange for acceptance or payment or demand acceptance or payment of the same within a reasonable time after the delivery thereof to the said plaintiff; nor was immediate notice of the non-acceptance or non-payment thereof given to the defendants, by telegraph or otherwise.

1483. Payment of bill, to drawer, before indorsement.

I. That after the bill mentioned in the complaint was due, and while said [drawer] was the holder thereof, and before this action, the defendant satisfied and discharged the principal and interest [and damages] due on said bill, by payment to the said [drawer].

II. That said [drawer] first indorsed said bill to the plaintiff after said payment.

1484. Fraudulent representations as to the character of the instrument (adapted from Walker v. Ebert, 29 Wis. 194).

I. That this defendant is a German, unable to read or write the English language, and that on the day of the date of supposed note in the complaint described, and just before the supposed making thereof the said E.... F.... and G.... H...., the payees named therein falsely and fraudulently represented to defendant with intent to swindle, cheat and defraud the defendant, that they would appoint him an agent for the town of for the exclusive sale of a certain patent and invention known as the Sulky Wheel Cultivator [*here set forth the representations and agreements orally made*]; that thereupon the said E.... F.... and G.... H.... presented to this defendant to sign in duplicate, an instrument partly written and partly printed, which this defendant was unable to read, and which the said E.... F.... and G.... H.... falsely and fraudulently then and there represented to be simply a contract of agency embracing the terms and conditions orally agreed on as aforesaid.

II. That thereupon this defendant, relying upon the truth of said representations, and believing that said instrument was simply an agency contract in duplicate, and being unable to read the same, and without negligence on his part, attached his signature to the said instrument in duplicate, and that the said E.... F.... and G.... H.... immediately took the same, and this defendant has not since that time seen the said instrument.

III. Upon information and belief the defendant alleges that in truth and in fact the said instrument so signed by defendant was in form a promissory note, and not an agency contract, and that the same is the identical note upon which this action is brought.

IV. That this defendant never intended to sign or deliver the said note, and never received any consideration of any kind therefor, but that the same, if signed by this defendant at all, was signed under the circumstances hereinbefore set forth, and not otherwise.

V. [*If plaintiff is an indorsee.*] That the plaintiff gave no valuable consideration for said note, but that the same was assigned to him after maturity thereof, and with knowledge of the facts hereinbefore stated.

1485. That note was given to compound a felony.

I. The defendant alleges that on or about the day of, 19.., this defendant [or one E.... F...., the son of

this defendant] feloniously [*here state crime committed*], and that thereafter it was agreed by and between this defendant and the said plaintiff that the defendant should execute and deliver to the said plaintiff his promissory note for the sum of dollars in settlement and satisfaction of the said crime, and for the purpose of compounding the same, and that in pursuance of said agreement the said note described in the complaint was executed and delivered to the plaintiff, and upon no other or different consideration.

CHAPTER XCV.

ANSWERS IN ACTIONS UPON AWARDS.

1486. Denial of parol submission.	1489. Denial of performance by
1487. Denial of award.	plaintiff.
1488. Performance by defendant.	1490. Invalidity of award.

1486. Denial of parol submission.

I. The defendant denies that he ever agreed with the defendant that any matters of dispute or difference between himself and the plaintiff should be submitted to arbitration, as alleged in said complaint.

1487. Denial of award.

I. The defendant denies that the said [*arbitrators or umpire*] at any time made or published any award as in said complaint alleged.

1488. Performance by defendant.

I. The defendant denies that he has failed or neglected to perform said award, and on the contrary thereof alleges that on the day of, 19.. [*here state what defendant has done by way of performance of the award*].

1489. Denial of performance by plaintiff.

I. The defendant denies that the plaintiff has performed said award, and alleges that the plaintiff did not [*here state breaches of award by the plaintiff*].

1490. Invalidity of award (*Knowlton v. Mickles*, 29 Barb. 465).

I. The defendant admits the submission of the said controversy to arbitration, and that the time for the delivery of the award was extended, as stated in the complaint.

II. The defendant denies [any knowledge or information sufficient to form a belief] that the arbitrators made an award [in writing, under their hands, and delivered the same to the plaintiff] within the time so limited therefor.

III. The defendant further says, that he never had any notice of the time or place when or where the said arbitrators

would meet to hear the matters submitted to them, or any opportunity of appearing before said arbitrators, nor of producing proof, nor examining witnesses, nor of being heard in his defense before said arbitrators; and the alleged award was made without any information or notice thereof to the defendant, until long after the day when the same is alleged to have been made.

IV. That the said arbitrators, on the day of, 19.., and while examining the premises and preparing their award, or immediately prior thereto, and on the same day, examined several witnesses touching the matters submitted to them by the parties, and took and heard their statements in respect thereto, in the presence of the plaintiff, and in the absence of, and unbeknown to, and without the consent of, the defendant.

V. That defendant had a good and substantial defense upon the merits, in the matter submitted to said arbitrators; and that he would have been entitled to an award in his favor, had an opportunity been afforded him of producing his proofs before the said arbitrators.

CHAPTER XCVI.

DEFENSES IN ACTIONS ON BONDS.

1491. That the bond sued on was on a condition, and that defendant has paid it.
1492. Failure of consideration.

1493. Failure of consideration in action on bond for purchase money.

1491. That the bond sued on was on a condition, and that defendant has paid it.

I. That the bond mentioned in the complaint was, and is subject to a condition thereunder written to make void the same, upon payment by the defendant to the plaintiff, on the day of, 19.., of the sum of dollars, with interest at the rate of per cent. [*or other condition*].

II. That the defendant on that day [*or after that day, and before the commencement of this action*] paid to the plaintiff the said sum of dollars, with all interest due thereon, and thereby fully performed and discharged the said condition.

1492. Failure of consideration.

I. That he gave said bond [with a mortgage collateral thereto] to said [*obligee*] solely in consideration of the performance by said [*obligee*] of the covenants and conditions, upon his part, in an agreement then made between them, of which agreement a copy is annexed as a part of this answer.

II. That this defendant duly performed all the conditions thereof on his part.

III. That the said [*obligee*],—*here allege breach, as in an action upon the contract*].

1493. Failure of consideration in action on bond for purchase money.

I, II, III and IV. [*Allege conveyance by the plaintiff to the defendant, with covenant, and breach thereof, in a similar manner as in a complaint in an action for breach of covenant, ante Chapter XXXIX.*]

V. That at the same time when the said conveyance was executed by the plaintiff [and his said wife] to-wit, on the said

.... day of, 19..., at the defendant, simultaneously with the execution of the said conveyance, executed and delivered to the plaintiff the bond mentioned in the complaint, as a security for the payment of the purchase money in the said conveyance mentioned, and for no other purpose or intent whatever; and the same, respectively, were so then and there accepted and received by the said plaintiff from the said defendant as such security as aforesaid.

CHAPTER XCVII.

DEFENSES IN ACTIONS ON GUARANTIES.

1494. Denial of performance by plaintiff.

1495. Departure from guaranty.

1494. Denial of performance by plaintiff.

I. The defendant denies that the plaintiff at any time sold or delivered the goods [*or* rendered the services] to the said E.... F...., as alleged in said complaint.

1495. Departure from guaranty.

I. The defendant denies that he at any time agreed or promised to be answerable generally to the plaintiff for the price of all goods sold by him to the said E.... F...., and on the contrary alleges that he agreed to be answerable only for goods to an amount not exceeding dollars [*or*, to be sold on a credit not exceeding months], which limit the plaintiff exceeded in his alleged sale.

CHAPTER XCVIII.

DEFENSES IN ACTIONS ON INSURANCE POLICIES.

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| 1496. Denial of policy. | 1509. Sale of damaged goods by plaintiff, and that defendants paid deficiency. |
| 1497. Denial of plaintiff's interest. | 1510. Other insurance, without consent. |
| 1498. Denial of loss from risk insured against. | 1511. Action not commenced within time limited by policy. |
| 1499. That the policy was obtained by misrepresentations. | 1512. Cancellation of policy before loss. |
| 1500. The same, in life insurance. | 1513. That death occurred while insured was violating law. |
| 1501. Denial of making of proof of loss. | 1514. That insured violated policy by traveling beyond territory limited. |
| 1502. Denial of certificate of notary. | 1515. That material statements in application were false. |
| 1503. That plaintiff gave a fraudulent account of loss. | 1516. Answer that building was unoccupied. |
| 1504. Transfers, without insurer's consent. | 1517. Voluntary assignment or mortgage by assured. |
| 1505. Existence of liens. | 1518. Outline of answer by fraternal benefit order alleging failure to conform to constitution or by-laws. |
| 1506. Extra-hazardous risk. | |
| 1507. Another form, correcting plaintiff's statement of the policy, and alleging extra-hazardous use of the premises. | |
| 1508. Unseaworthiness of vessel. | |

1496. Denial of policy.

The defendant denies that on the day of, 19.., or at any other time it executed or delivered the policy of insurance described in the plaintiff's complaint.

1497. Denial of plaintiff's interest.

I. The defendant denies that the plaintiff owned or had any insurable interest in the said goods [*or the said building, or its contents*] at the time of the happening of the said loss in the complaint described.

1498. Denial of loss from risk insured against.

I. The defendant denies that the said building was destroyed [*or injured*] during the term of said insurance by [*here state*

risks or perils insured against], but on the contrary, the defendant alleges that said loss occurred wholly by [*here state the accepted peril which caused the loss*].

1499. That the policy was obtained by misrepresentations.¹

That the defendants were induced to make and deliver the policy, and become insurers, as alleged in the said complaint, by the misrepresentation made by the plaintiff to the defendants of a fact then material to be known to the defendants, and material to the risk of the said policy; that is to say, by the misrepresentation that the said vessel was loaded with hides, whereas a large portion of her cargo consisted of guano [*or, that the said vessel had sailed from on the day of, 19.., where she had not sailed from on that day, but on the day of, 19..*], as the plaintiff well knew.

1500. The same, in life insurance (see note to preceding form).

That a material fact stated in the application mentioned in the policy which is alleged in the said complaint, and which was thereby agreed to be the basis of the said insurance, was untrue; that is to say [*or, where the representation was not incorporated in the contract: That the said M.... N.... induced the defendants to subscribe the policy and become insurers as alleged, by falsely and fraudulently representing to them*], that at the time of the delivery of said declaration to the defendants said M.... N.... was in a good state of health, and was not afflicted with any disease or disorder tending to shorten life; whereas, he was not then in good health, but was afflicted with, a disease which does tend to shorten life.

1501. Denial of making of proof of loss.

The defendant denies that the said plaintiff did, within days, which was the time limited in the conditions annexed to the said policy, nor within a reasonable time after the said loss, make out or deliver a particular account of such loss and damage, signed by or on behalf of the plaintiff, and verified by his oath or affirmation; but neglected to do so for the space of months after said loss.

¹ The defense of fraudulent representations or warranties must be affirmatively pleaded; the exact misrepresentations relied on

must be set forth, and the proof will be limited to the misrepresentations alleged.

1502. Denial of certificate of notary.

That the plaintiff did not, within days, which was the time limited in the conditions annexed to the policy, nor within a reasonable time after said loss procure [nor has he at any time since procured, nor delivered to the defendants], the certificate, under the hand of a magistrate or notary public, which is by the conditions annexed to the said policy, required of the said plaintiff.

1503. That plaintiff gave a fraudulent account of loss.

That after the alleged loss and damage, and before action, the plaintiff made and delivered to the defendants a false and fraudulent account of the alleged loss and damage, as and for such account as is mentioned in the conditions contained in [*or annexed to*] said policy, in which said account he represented and stated that insured goods and property of the plaintiff to the amount of dollars had been burnt and destroyed by the said fire, and that his loss and damage by the said fire were to the said amount of dollars, with intent to induce the defendants to pay to him said amount; whereas insured goods and property of the plaintiff had not been burnt or destroyed by said fire to that amount, and his said loss and damage do not exceed dollars, as the plaintiff then well knew.

1504. Transfer, without insurer's consent.

I. That it is, among other things, provided by said insurance policy, that in case of any transfer or termination of the interest of the insured, either by sale or otherwise of the property insured, without the consent of the company, the policy should from thenceforth be void.

II. That after the making of said policy, and before the loss alleged, the interest of the said [*insured*] in said [*things insured*] was terminated and transferred, and the title thereto vested in said plaintiff without the consent of the defendants, whereby the policy became, and was, void at the time of said loss.

1505. Existence of liens.

I. [*Allege provisions of policy, similarly as in preceding form.*]

II. That at the time of making said policy, the said interest of [*the insured*] was not free from all liens and claims that might be prosecuted against the said [*thing insured*]; but on the contrary, the same was subject to a chattel mortgage, which

was unknown to the defendants at the time of issuing said policy, which mortgage was dated on the day of, 19.., and given by said plaintiff to one M.... N.... to secure dollars.

1506. Extra-hazardous risk.²

I. [*Allege provisions of policy, similarly as in preceding form.*]

II. That after the making of the said policy, and before the loss alleged, the plaintiff received into his said store a large quantity of goods known and described as extra-hazardous, to-wit, ... well knowing that such reception was a violation of the conditions in the said policy contained; and at the time of the said fire, the said plaintiff had in said store a large quantity of such extra-hazardous goods.

1507. Another form. Correcting plaintiff's statement of the policy, and alleging extra-hazardous use of the premises.

I. The defendants admit that they are a corporation duly created by and under the laws of this state, and that they did, on or about the day of, 19.., at, in consideration of dollars, to them paid, execute and deliver to M.... N...., in the complaint named, a policy of insurance, whereby they insured the said M.... N.... to the amount of dollars against loss or damage by fire upon [his stock of books and stationery contained in the five-story brick building, No., in street] subject, nevertheless, and upon the terms, conditions, limitations, and restrictions in the said policy, and hereafter particularly referred to, and not otherwise; but the defendants deny that they insured the said M.... N.... in the way and manner, and to the extent and with the privileges, in the complaint alleged; and they also deny that the paper annexed to the complaint, and purporting to be a copy of the said policy, is a correct copy of the policy so issued by the defendants and delivered to the said M.... N.... as above admitted, and which was the only policy ever issued to him by these defendants.

II. And these defendants further allege that it was in and by the policy so executed and delivered as aforesaid amongst other things, agreed and declared on the part of both parties that [*setting forth provisions relied on*].

² This is an affirmative defense, and must be specially pleaded by defendant.

III. And further, "and that this policy is made and accepted in reference to the proposals or conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto, in all cases not herein otherwise specially provided for."

IV. And these defendants further allege that at the time of the execution and delivery of the said policy, there was annexed thereto a printed paper containing "proposals for insuring" and "conditions of insurance," together with "classes of hazards," embracing therein articles designated "Hazardous," "Extra-hazardous," and "Memorandum of special rates," which proposals and conditions became and were part of the contract, and by which it was agreed and declared that [*setting forth the conditions relied on*].

V. These defendants deny that the said M.... N.... fulfilled or performed the terms and conditions imposed upon and assumed by him in and by the said policy, and the proposals and conditions aforesaid; but on the contrary, the defendants, upon information and belief, aver that they, the said M.... N.... did violate the same.

VI. They further allege that after the delivery of the said policy, and before the loss in the complaint alleged, and on or about the day of, 19.., the said M.... N...., without the knowledge, approbation, or consent of the defendants, and against their will, used the story of the building in the said policy mentioned, or suffered the same to be used, as and for a [bookbindery] and continued to make, or suffered such use, from thence until and at the time of the fire in the complaint mentioned.

VII. And these defendants further allege that they never knew or had notice that the said building was so improperly used and occupied until after the said fire; that they never in any way authorized or acquiesced in such use thereof; that they never charged or received any premium for such additional risk.

VIII. They further allege that by reason of such wrongful and improper use of the said story, the risk assumed by the defendants in and by the said policy became and was increased and rendered more hazardous than it was at the time the said policy was issued; by reason whereof the said policy became void, and at the time of the alleged fire, which they admit occurred, they were not insurers of the said M.... N.... for any sum.

IX. These defendants, further answering, deny each and every allegation in said complaint contained not hereinbefore specifically admitted.

1508. Unseaworthiness of vessel.

I. [*Allege provisions of policy, as in Form 1504, unless it appears by the complaint.*]

II. That at, and in the course of said voyage, and in reference to the said voyage, and to any damage which the said ship sustained in the prosecution thereof, a regular survey was had on the day of, 19.., upon which survey the said ship was thereby declared unseaworthy, by reason of her being rotten [*or state particulars, showing a ground of her condemnation wholly within the provisions of the policy*].

1509. Sale of damaged goods by plaintiff, and that defendants paid deficiency.

I. That the invoice value of the said [*insured goods*] amounted to dollars, and that the said last-mentioned amount was the sum insured thereon under the policy mentioned in the complaint, and that the net market-value of the said [*insured goods*], if the same had not been damaged, was estimated by S. . . . C. . . . & Co., by whom the said insurance was effected, at the sum of dollars.

II. That the said [*insured goods*] were sold by auction in the city of, on or about the day of, 19.., by order of the said S. . . . C. . . . & Co.

III. That the proceeds of such sale amounted to dollars; thereby showing a loss of per cent. on the above estimated net market-value of the said goods, if the same had not been damaged. That the same percentage on the sum insured on the said goods amounted to dollars; and that the defendants, on or about the day of, 19.., paid the said last-mentioned sum, together with the expenses of the said sale by auction, to the said S. . . . C. . . . & Co., and that the said S. . . . C. . . . & Co., accepted and received such payment as an adjustment and settlement of the damage or injury to the said goods.

1510. Other insurance, without consent.

I. The defendant alleges that the said insurance policy provides [*here set forth terms of condition in policy prohibiting other insurance, if the same be not set forth by the plaintiff in his complaint*].

II. That at the time of the issuance of the said policy the said property had been previously and then was insured in another company, to-wit, the A. . . . X. . . . company, in the sum of dollars, of which previous insurance this defendant

had no knowledge, nor did this defendant consent thereto, nor indorse such consent upon the policy described in the complaint in this action. [*If the additional insurance was effected after the issuance of the policy in suit, vary the foregoing allegation accordingly.*]

1511. Action not commenced within time limited by policy.

I. The defendant alleges that the said insurance policy provides [*here set forth terms of provisions requiring action to be brought on the policy within a limited time*].

II. That the said fire [*or loss*] occurred on the day of, 19.., and that this action was commenced by the service of summons on the day of, 19.., which was more than days after the occurrence of the said fire [*or loss*], whereby this action has become wholly barred by the terms of the said policy.

1512. Cancellation of policy before loss.

I. The defendant alleges that the said policy of insurance contained the following provision [*here set forth provision allowing cancellation, if it be not set forth in plaintiff's complaint*].

II. That on the day of, 19.., this defendant made and served upon the plaintiff a notice of its election to cancel said policy, of which notice the following is a copy [*copy of notice*].

III. That at the time of the service of said notice of cancellation the defendant tendered to the plaintiff the sum of dollars, being the amount of unearned premium upon said policy, upon cancellation thereof, but that plaintiff refused and still refuses to accept said unearned premium, or to surrender said policy, although the defendant has ever since been and is now ready and willing to pay to the plaintiff said unearned premium, and now brings the same into court with this answer for the benefit of the plaintiff, if he will accept the same.

1513. That death occurred while insured was violating law.

I. The defendant alleges that said policy contains the following provision [*here insert provision containing the agreement relieving the company from liability if death occurs while the insured is violating law, if the provision is not already set forth in the complaint*].

II. The defendant further alleges that the said insured died while engaged in violating the laws of the state of and in consequence thereof, to-wit, said death occurred while de-

ceased was [*here state crime or offense in which deceased was engaged, with particularity and certainty*].

1514. That insured violated policy by traveling beyond territory limited.

I. That the said policy of insurance described in the complaint herein contained a provision to the effect that the same should be void if the said assured should without written consent of this defendant go beyond [*here state limits fixed by policy*].

II. [*Upon information and belief*] that on or about the day of, 19.., and while said policy was in full force, the said assured, without the consent of this defendant, went [*here state where*], whereby, as this defendant claims and insists, said policy became and is wholly void.

1515. That material statements in application were false.

I. That the said policy of insurance mentioned in the complaint was founded upon and issued in consideration of the statements made by the said E.... F.... in his written application for insurance, which said application was made by said assured and presented to this company on or about the day of, 19..

II. That said application so made contained the following question, viz. [*state question*], and that the said assured answered the said question in writing and made his said answer a part of said application, as follows [*state answer*].

III. That the said answer so made in said application was wilfully false when made, and known so to be by the said assured: that the said assured was not at that time [*here negative the false statement*], but on the contrary, was [*here state the real fact*].

IV. That the said statement so made by said assured was material to the risk, and was relied upon and believed by this defendant, and that the said policy was thereafter issued by reason of said statement, and in reliance thereon, and not otherwise.

1516. Answer that building was unoccupied.

I. That said policy contained the following provision [*insert provision prohibiting vacancy without consent*].

II. That the building described in said policy became vacant and unoccupied on or about the day of, 19.., and so remained vacant and unoccupied up to the time of the said fire, and that this defendant at no time consented that such

building might remain vacant or unoccupied, nor was such consent ever indorsed upon said policy, whereby said policy became wholly void.

1517. Voluntary assignment or mortgage by assured.

I. That the said policy of insurance contained the following provision [*insert provision prohibiting the change of title of property or mortgage*].

II. That on or about the day of, 19.., the said assured duly made and executed and delivered a voluntary assignment for the benefit of his creditors to one L.... M...., which assignment conformed in all respects to the requirements of the statutes of the state of and was fully perfected by the execution and filing in the proper office of all bonds, schedules, inventories and other papers required by law to be executed or filed in order to constitute a complete voluntary assignment under the laws of said state.

[II. *If it be claimed that policy is avoided by mortgage:* That on or about the day of, 19.., the said plaintiff executed and delivered to one O.... P.... a mortgage upon said property for the sum of dollars, without the knowledge of the defendant and without any consent on the part of this defendant, either indorsed upon said policy, or otherwise, whereby said policy has become wholly void.]

1518. Outline of answer by fraternal benefit order, alleging failure to conform to constitution or by-laws.

I. That the said assured made a written application for membership in the defendant order on or about the day of, 19.., and that the said benefit certificate mentioned in the complaint was issued in reliance upon said application, and the statements and agreements therein contained; that among the said statements and agreements was an agreement that the said assured should be governed by all the provisions of the constitution and by-laws of said order then existing, or which might thereafter be adopted, and that failure to conform to such provisions or any of them should avoid the said certificate.

II. That the constitution of said order then contained and still contains the following provision [*insert provision claimed to have been violated*].

III. That on or about the day of, 19.., the said assured [*here state violation of the provision with particularity*], and that by reason thereof the said certificate became and is void and of no effect.

CHAPTER XCIX.

DEFENSES IN ACTIONS ON LEASES.

1519. Denial of hiring.	1528. By a surety, alleging extension of time.
1520. Denial of execution of lease.	1529. By surety, showing neglect to collect from the principal, or give notice of non-payment.
1521. Denial by assignee.	1530. Destruction or serious injury to premises, and surrender thereof.
1522. Assignee's assignment to third person.	1531. Dilapidation by which premises are made unfit for occupation.
1523. Tender of rent upon the land.	
1524. Eviction.	
1525. The same, as a defense to one instalment.	
1526. Surrender of the premises.	
1527. That the landlord accepted an assignee as his tenant.	

1519. Denial of hiring.

The defendant denies that he at any time hired of the plaintiff the premises described in the complaint as therein alleged.

1520. Denial of execution of lease.

The defendant denies that the plaintiff at any time executed or delivered to the defendant or that the defendant at any time executed or received from the plaintiff any lease of the premises described in said complaint, as therein alleged.

1521. Denial by assignee.

The defendant denies that any assignment of the lease described in the complaint was at any time made to or accepted by the defendant, and further denies that the defendant at any time occupied the said premises under the said lease.

1522. Assignee's assignment to third person.

That before the rent claimed in the complaint became due, and on or about the day of, 19.., this defendant assigned and transferred all his interest in said lease to one E.... F.... who then entered into possession of said premises and so continued when said rent became due.

1523. Tender of rent upon the land.

I. That he was present at the said demised dwelling-house at the time when the said dollars became due as afore-

said, to-wit, on the day of, 19.., for a reasonable time, to-wit, the space of one hour before sunset, and there continued until a reasonable time, to-wit, one hour after sunset on the same day, and during all the interval of time aforesaid was there, ready to pay the said dollars to the plaintiff.

II. That neither the said plaintiff, nor any other person on his behalf, during any part of said time, was there ready to receive the same.

III. That since the said day the defendant has always been, and still is, ready to pay the said dollars to the plaintiff; and he now brings the said dollars here into court, ready to be paid to the said plaintiff, if he will accept the same.

1524. Eviction.¹

I. That after the making of the lease [*or*, after the letting] mentioned in the complaint, and before any part of the rent in the complaint demanded * became payable, the plaintiff forcibly entered upon the premises, and removed the defendant therefrom [*or*, from a part thereof, to-wit, *describing the part*], and kept him out of possession from thence until the day of, 19.. [*or*, until after said rent became due].

1525. The same; as a defense to one instalment.

The defendant alleges that as to the last instalment mentioned in the complaint, after the alleged lease was made [*or*, after the alleged letting] and before said instalment [*continue as in preceding form from the **].

1526. Surrender of the premises.

The defendant alleges that before the rent claimed in the complaint became due [*or*, before the alleged breaches set forth in the complaint herein] the defendant surrendered to the plaintiff the demised premises, and all the residue of the said term then to come, and unexpired therein; and the plaintiff then accepted such surrender, and took possession of the said premises.

¹ For various forms of allegation of eviction see forms of complaints for breach of covenants in Chapter XXXIX, *ante*. Prior to the code constructive eviction by annoyances committed by the landlord might be shown under this plea (*Dyett v. Pendleton*, 8

Cowen, 727); but probably under the code, the facts should be stated. The eviction must be alleged to have taken place before the rent fell due. *McCarty v. Hudson*, 24 *Wend.* 291; *Vernam v. Smith*, 75 *N. Y.* 327.

1527. That the landlord accepted an assignee as his tenant.

I. The defendant alleges that before the rent [*or*, the last instalment of rent] claimed in the complaint became due [*or*, before the breaches alleged in said complaint the defendant duly assigned [by deed] all his estate and term of years then to come and unexpired in the demised premises to M.... N...., who then entered into the same, and was possessed thereof for the residue of said term.

II. That the plaintiff then had notice thereof, and afterwards accepted from the said M.... N.... rent under the lease [*or*, agreement] mentioned in the complaint, and accepted the said M.... N.... as his tenant of said premises.

1528. By a surety, alleging extension of time.²

I. The defendant alleges that on the day of, 19.., at [*or* at some time and place unknown to the defendant], the plaintiff agreed with said [*debtor*], in consideration of dollars [*or*, for a valuable consideration], to forbear and extend the time of payment of the said rent guaranteed by the defendant days [*or*, from the day of, 19.., on which the same was due, until the day of, 19..]

II. That the defendant had no knowledge of [*or* did not assent to] the said agreement to extend the time.

1529. By surety, showing neglect to collect from the principal, or give notice of non-payment.

I. The defendant alleges that the plaintiff never gave this defendant any notice of the alleged non-payment of said rent by said [*debtor*] until more than months after the termination of the lease, and has never made any demand on this defendant for payment of said rent, except by the commencement of this action.

II. That at the time alleged in the complaint as the time when the said supposed debt became due the said [*debtor*] was solvent, and able to pay the same, and it might have been collected from him if the plaintiff had used due and diligent effort; but he unreasonably and improperly neglected so to do.

III. That since that time, and before said months thereafter had elapsed, the said [*debtor*] became, and now is, wholly insolvent and unable to pay the said debt; and has failed to make payment thereof, if at all, through the unreasonable neg-

² This is an affirmative defense, order to admit evidence of the and must be specially pleaded in fact.

lect of the plaintiff to proceed in the collection of the same from him, or to give this defendant due notice of his default.

1530. Destruction or serious injury to premises, and surrender thereof.³

I. The defendant alleges that on or about the day of, 19.., without fault or neglect on his part, the said dwelling-house [*or other building*] was totally destroyed by fire [*or, was partially destroyed by fire, or otherwise state the injury according to the facts*], so that the same became and was untenable and unfit for occupancy, and that on account of such destruction [*or injury*] and on the day of, 19.., this defendant, by reason thereof, quit and surrendered possession of the said building and premises [*and the plaintiff thereupon accepted such surrender and went into possession thereof, and has since retained such possession*].

1531. Dilapidation by which premises are made unfit for occupation.⁴

I. The defendant alleges that on or about the day of, 19.., without negligence on the part of the defendant, said dwelling-house became dilapidated and out of repair in this [*here state nature of dilapidations, and cause thereof*], so that said building, by reason of said dilapidations, became and remained unfit for the accommodation of human beings.

II. That thereafter, and on or about the day of, 19.., this defendant duly notified the plaintiff [*in writing, if notification was written*] of the fact of such dilapidation and requested the defendant to repair the same, but that the said plaintiff refused and neglected to make such repairs, and that the defendant thereafter, and on the day of, 19.., vacated the said premises and has never since that time occupied the same, whereby the defendant alleges that he has been and is discharged from any obligation to pay the rent claimed in the complaint.

³ This is not a defense, unless made so by statute, or by the provisions of the lease. This form is drawn to meet the terms of the statute of Minnesota. Minn. Rev. Laws 1905 sec. 3331.

⁴ This form is intended to meet

the requirements of the statutes of North and South Dakota. N. Dak. Rev. Codes secs. 4080 and 4081; S. Dak. Rev. Codes C. C. secs. 1433 and 1434. See note to next preceding form.

CHAPTER C.

DEFENSES IN ACTIONS ON JUDGMENTS.

- | | |
|---|--|
| 1532. Denial of judgment. | 1535. Payment of judgment. |
| 1533. Invalidity of judgment because of failure to obtain jurisdiction of the person. | 1536. Subsequent vacation of judgment. |
| 1534. Failure to obtain jurisdiction of non-resident defendant. | 1537. Fraud in the recovery of the judgment. |

1532. Denial of judgment.¹

I. The defendant denies that the pretended judgment set forth in the complaint was ever rendered in the court as in said complaint alleged, and further denies that the said pretended judgment was ever docketed in the office of the clerk of said court, as in said complaint alleged.

1533. Invalidity of judgment because of failure to obtain jurisdiction of the person.

I. The defendant alleges that no summons [*or otherwise properly name the original process according to the statute of the particular state*] was at any time served upon him in the action described in the complaint herein, and the defendant further alleges that he never appeared in person or by attorney in the said action.

1534. Failure to obtain jurisdiction of non-resident defendant.

I. The defendant alleges that the action in which the supposed judgment against him was alleged to have been recovered arose upon an alleged contract [*or otherwise state the nature of the action*].

II. That when the action was commenced this defendant was a non-resident of the state of and a resident of the state of

¹ If the defense consists of an attempt to impeach the validity of a judgment regular in form on the ground of fraud or lack of jurisdiction by facts outside of the record, some one of the following forms should be used. This form simply denies the existence of a record judgment.

III. That he never appeared in that action, and never was personally served in the state of with summons [*or otherwise properly name the original process*] therein.

IV. That when the said supposed judgment was rendered the said court had acquired no jurisdiction of the person of the defendant for the following reasons [*here state particularly the defect or defects in the proceedings for publication of the summons, or the failure to make publication or mailing, by reason of which no jurisdiction was acquired*].

1535. Payment of judgment.

The defendant alleges that on the day of, 19.., and before the commencement of this action, this defendant paid to the plaintiff dollars, in full settlement and discharge of said judgment, and of the alleged cause of action upon which the same was founded.

1536. Subsequent vacation of judgment.

That on or about the day of, 19.., upon motion duly made, the said court duly made and entered an order setting aside and vacating the said judgment described in the complaint.

1537. Fraud in the recovery of the judgment.²

I. The defendant alleges, by way of counter-claim, that after the commencement of the action mentioned in the complaint, the

² In Wisconsin relief against a judgment obtained against a party through his mistake, inadvertance, surprise, or excusable neglect, must be obtained by motion within one year after notice. Wis. Stats. 1898 sec. 2832. However, if fraud or collusion be charged, an action in equity may be maintained, not for the purpose of vacating the judgment, but for the purpose of preventing its inequitable enforcement. If such an action may be maintained, it would seem to follow that the same relief may be obtained by equitable counter-claim, hence this defense is pleaded as a counter-claim. *Crowns v. Forest Land Co.*, 102 Wis. 97.

In Minnesota, under Minn. Rev. Laws 1905 sec. 4277, an action in

equity to set aside a judgment for fraud may be brought within three years after discovery of the fraud, but the complaint must show that the action was brought within the statutory time, and that the defendant was free from contributory negligence. *Schweinfurter v. Schmal*, 69 Minn. 418 s.c. 72 N. W. 702. Doubtless the same relief could be obtained by equitable counter-claim in an action to enforce the judgment, but the allegations should be sufficient to sustain the counter-claim as a complaint. *Vaule v. Miller*, 69 Minn. 440 s.c. 72 N. W. 453. The facts showing the defendant's freedom from negligence must clearly and affirmatively appear. *Schweinfurter v. Schmal*, *supra*.

said plaintiff came to this defendant and, with intent to deceive him, and prevent him from defending it, falsely and fraudulently represented [*here state representations, e. g., thus*]: that he, said plaintiff, intended to and would dismiss said action, and that this defendant need not appear therein. [*The false representations or other fraud relied on must be fully set forth.*]

II. That, relying on said representations, this defendant omitted to appear therein, as he otherwise would have done.

III. That the plaintiff, thereafter, and without the knowledge of, or notice to, this defendant, proceeded to judgment therein, with intent to defraud him.

IV. That the defendant had no knowledge of the existence of said judgment until the day of, 19..

V. That the defendant was not indebted to the plaintiff in the sum claimed in the complaint in said action, nor in any sum whatever, but had and still has a complete and perfect defense to said action, to-wit [*the defense should be fully stated as in a pleading*].

WHEREFORE the defendant demands that said judgment be set aside and vacated, that the plaintiff be perpetually enjoined from in any manner collecting or enforcing the same, and for such other relief as may be equitable, with his costs.

CHAPTER CI.

DEFENSES IN ACTIONS ON COVENANTS.

1538. Denial of breach of covenant.

1539. Accord and satisfaction.

1538. Denial of breach of covenant.

I. The defendant alleges that he duly performed all the conditions of the contract set forth in the complaint on his part to be performed, and [*here state the performance following the words of the covenant*].

1539. Accord and satisfaction.

I. [*Follow Form 1362.*]

CHAPTER CII.

DEFENSES IN ACTIONS ON EMPLOYMENT CONTRACTS.

- | | |
|---|---|
| 1540. Denial of performance by plaintiff. | 1544. Abandonment of the employment by plaintiff. |
| 1541. Performance by defendant. | 1545. Termination of service by notice under the terms of the contract. |
| 1542. Plaintiff's failure preventing defendant's performance. | 1546. Discharge on account of plaintiff's incompetency. |
| 1543. Alleging plaintiff's discharge for misconduct. | |

1540. Denial of performance by plaintiff.

I. The defendant denies that the said plaintiff has performed the conditions of said contract of employment mentioned in the complaint on his part to be performed; and on the contrary thereof alleges that the said plaintiff has wholly omitted to [*here state breach specifically as in a complaint*].

1541. Performance by defendant.

I. The defendant alleges that he fully performed all the conditions of said contract of employment on his part to be performed, and on the day of, 19.., manufactured the said [*name articles*] and delivered the same to the plaintiff [*or tendered the same to the plaintiff and has ever since been and still is ready and willing to deliver the same, but that the plaintiff refused and still refuses to accept the same, and pay therefor, or otherwise fully set forth the acts of performance with particularity*].

1542. Plaintiff's failure preventing defendant's performance.

I. That at the time of making said agreement, the plaintiffs agreed, in writing, with this defendant, that in consideration that he would deliver to them, at their warehouse in, the said quantity of shelled corn, they, the said plaintiffs, would pay this defendant twenty cents a bushel therefor, and would furnish to this defendant a thresher to thresh said corn for one cent a bushel.

II. That the said plaintiffs failed and refused to furnish said threshers, though this defendant, on the day of, 19.., requested them so to do; whereby this defendant was disabled from performing his said contract.

1543. Alleging plaintiff's discharge for misconduct.

I. The defendant alleges that by the terms of said contract of employment it was provided that the plaintiff should [*here set forth terms of the agreement which the plaintiff breached, also set forth provision authorizing discharge if there be any*].

II. That notwithstanding the said agreement on the part of the said plaintiff, and in violation thereof, the said plaintiff on and between the day of, 19.., and the day of, 19.., did not [*here negative performance of the agreement in question, and state affirmatively the misconduct charged, as in a complaint*].

III. That by reason of the said violation of his said agreement by the said plaintiff, this defendant on the day of, 19.., discharged the said plaintiff from his employment, as he of right might do, and that such discharge constitutes the supposed breach of the contract of employment aforesaid, which is alleged in the complaint.

1544. Abandonment of the employment by plaintiff.

I. The defendant alleges that on or about the day of, 19.., the plaintiff wilfully abandoned the employment of the defendant, and thereafter refused to render any service to defendant under his said contract of employment, although requested by defendant so to do.

1545. Termination of service by notice under the terms of the contract.

I. The defendant alleges that the said contract of employment provided among other things that [*here set forth the provisions of the contract providing for the termination of the employment by notice, e. g., either party thereto might terminate the same by giving to the other party thirty days' notice in writing of his desire and intention to terminate said employment. If the provision be set forth in the complaint this allegation will, of course, be unnecessary*].

II. That pursuant to the terms of said contract, and on the day of, 19.., this defendant gave to the plaintiff a written notice stating that he desired to and did thereby terminate said contract of employment on the day of, 19.., whereby the said contract became and was terminated on

said last named date, and the defendant relieved from all liability thereunder; and defendant denies that plaintiff has rendered any service to the defendant after said last-named date under said contract or otherwise.

1546. Discharge on account of plaintiff's incompetency.

I. The defendant alleges that by the said contract of employment the plaintiff agreed to perform for the defendant the services of a competent engineer in charge of defendant's stationary engine [*or otherwise state the character of the service*], which services the plaintiff at the time of the contract represented himself able and competent to perform.

II. That the defendant, relying on the truth of such representation, thereupon entered into said contract of employment, but that the plaintiff was not a competent engineer, and was not in fact a competent stationary engineer and unable to perform, and did not in fact perform the services of such an engineer in this [*here set forth the nature of the incompetency as fully as possible*].

III. That by reason of the plaintiff's aforesaid incompetence on the day of, 19.., the defendant discharged the said plaintiff as he lawfully might do.

CHAPTER CIII.

DEFENSES IN ACTIONS OF BREACH OF PROMISE OF MARRIAGE.

1547. Denial of promise.

1548. Denial of plaintiff's readiness.

1549. Denial of breach.

1550. Bad character of plaintiff at time of promise.

1551. Bad character of plaintiff after the promise.

1547. Denial of promise.

The defendant denies that he at any time promised or agreed to marry the plaintiff, as in said complaint alleged.

1548. Denial of plaintiff's readiness.

The defendant denies that the plaintiff has at any time been ready or willing to marry the defendant, and defendant denies that the plaintiff at any time offered to marry the defendant, as in the said complaint alleged.

1549. Denial of breach.

The defendant denies that he at any time refused to marry the plaintiff, but on the contrary thereof alleges that on or about the day of , 19 . . , he offered to marry the plaintiff, and ever since said date has been and now is ready and willing to marry the plaintiff, which fact the plaintiff well knew.

1550. Bad character of plaintiff at time of promise.

I. The defendant alleges that at the time of the making of the promise in the said complaint alleged the plaintiff was unchaste [*or habitually intemperate*], and generally reputed among her neighbors so to be.

II. That defendant was wholly ignorant thereof at that time.

III. That upon being informed thereof, the defendant refused to marry the plaintiff.

1551. Bad character of plaintiff after the promise.

I. That after the time mentioned as the time of said supposed promise, and on the day of , 19 . . , at , the plaintiff, without the connivance of the defendant, had carnal connection with one M N

II. [*As III in preceding form.*]

CHAPTER CIV.

DEFENSES IN ACTIONS ON SALES.¹

1552. Alleging breach of contract as to delivery.	1557. Denial of plaintiff's performance.
1553. The same, as to quality.	1558. Another form, sale of real property.
1554. Breach of warranty in sale.	1559. Abandonment of contract by plaintiff.
1555. That goods did not correspond to contract.	
1556. That goods did not correspond to sample.	

1552. Alleging breach of contract as to delivery.

I. The defendant alleges that it was part of the agreement of sale referred to in the complaint, that the plaintiff should deliver the said goods sold, at

II. That the said goods have not been so delivered, nor tendered, and have not been received or accepted by defendant.

1553. The same, as to quality.

I. That it was a part of the agreement referred to in the complaint, that the [furniture therein mentioned should be made of rosewood].

II. That the said [furniture] was not [made of rosewood] but was made of [state fact].

III. That, therefore, the defendant, on the day of, 19 . . . , and as soon as he discovered the defect, returned the same to the plaintiff [or duly tendered the same back to the plaintiff, and has ever since been and still is, willing to return them].

1554. Breach of warranty in sale.

I. The defendant alleges that at the time of the sale of the said goods [*or other property, describing the same*], described in the complaint, the plaintiff warranted the same to be [*here state warranty, as: genuine china ware*].

II. That the said goods were not in fact genuine china ware.

III. [*As in last preceding form if defendant has refused to accept; if goods are retained by defendant and damages are sought by way of counter-claim, see complaints for breach of warranty.*]

1555. That goods did not correspond to contract.

I. The defendant alleges that it was agreed as part of the said contract of sale that the said [*describe the property sold*] should

¹ For general defenses, common to many actions, see first chapters under the head of "Answers."

be [*here state agreement, as for example, first class potatoes free from rot*].

II. That when the said potatoes were offered by the plaintiff to the defendant in pretended compliance with said contract, the defendant examined the same and found, as the fact was, that the said potatoes were not first class potatoes, and that twenty per cent. thereof were rotten [*or otherwise describe the defect, according to the fact*], whereupon the defendant refused to receive the same, and notified the plaintiff of such refusal, and that defendant has not accepted the same or any part thereof.

1556. That goods did not correspond to sample.

I. The defendant alleges that at the time of the making of the said contract of sale mentioned in the complaint, the plaintiff exhibited to the defendant a sample of the said goods so to be sold, and agreed that the said goods would and should be in all respects equal in quality to the said sample.

II. That when the said goods were offered by the plaintiff to the defendant in pretended compliance with said contract, the defendant found, as the fact was, that the same were not equal in quality to the said sample in this [*here state nature of defects*], whereupon [*state refusal to receive, and non-acceptance, as in last preceding form*].

1557. Denial of plaintiff's performance.

That the plaintiff has not performed the conditions of said agreement on his part; but, on the contrary, has wholly omitted [*here state breach, as if in a complaint against him*].

1558. Another form, sale of real property.

I. That the plaintiff, by said agreement, undertook to convey the property therein mentioned to the defendant free from all incumbrances.

Or: I. That the said agreement contained a stipulation, on the part of the plaintiff, of which the following is a copy [*copy of provision as to title*].

II. That there was then, and still is, a mortgage on the same, in the sum of dollars, unsatisfied of record, in book , page of Mortgages, in the office of the register of deeds of the county of

1559. Abandonment of contract by plaintiff.

That on the day of , 19.. , and before the time for the defendant to perform said contract on his part, the plaintiff gave notice in writing to the defendant that he had determined not to take the [land]; and the plaintiff abandoned the agreement, and ever since wholly failed to perform it.

CHAPTER CV.

DEFENSES IN ACTIONS ON WARRANTIES.

1560. Denial of warranty.

1561. Denial of breach.

1560. Denial of warranty.

I. The defendant denies that he at any time represented or warranted to the plaintiff that any sum whatever was due upon said note [*or, that said horse was sound, or kind, or true, or gentle, or quiet in harness*], as alleged [but that the plaintiff purchased said with notice [*here state defect, if any*], and not relying on any representations of the defendant].

1561. Denial of breach.

The defendant denies that at the time of the said sale mentioned in the complaint the said horse was knee-sprung, or [*here deny breach of the other terms of the warranty, if any, in the disjunctive*].

CHAPTER CVI.

DEFENSES IN ACTIONS AGAINST AGENTS, BAILEES, CARRIERS, AND TRUSTEES.

- | | |
|--|--|
| 1562. Special denial of agent's negligence in sale. | 1569. Denial of delivery of goods. |
| 1563. Denial of agent's negligence in giving credit. | 1570. Denial of loss. |
| 1564. Denial of agent's negligence in services. | 1571. That the contract was special. |
| 1565. Denial of bailment. | 1572. That the damage was by plaintiff's fault. |
| 1566. That bailment is held as a pledge. | 1573. That the goods were lost by a risk for which defendants were not liable. |
| 1567. Denial that defendant was a common carrier. | 1574. That the value of the goods lost was agreed on. |
| 1568. Denial of employment. | 1575. Denial of trust. |

1562. Special denial of agent's negligence in sale.

The defendant denies that he was in any respect negligent in or about the selling of the said goods in the complaint described, and alleges that he sold the same as soon [or for as large a price] as with due diligence he could.

1563. Denial of agent's negligence in giving credit.

The defendant alleges that he sold said goods to one M.... N...., who was then a merchant at in good standing and credit, for the sum of dollars; and for the payment of which sum he took the bill of the said M.... N...., drawn on and accepted by one O.... P...., payable in months after date, which bill was at the time held and considered an approved bill, and defendant denies that he was negligent in giving such credit or in taking said bill, and further denies that said M.... N.... was then embarrassed or insolvent, or that defendant knew him to be so.

1564. Denial of agent's negligence in services.

Defendant denies that he was negligent in or about [the stowing of said cargo], but used due care and diligence therein; and the alleged loss [or injury], if any, accrued, not through the fault of the defendant, but [*briefly indicating the cause*].

1565. Denial of bailment (sustained in *Beach v. Berdell*, 2 Duer, 327).

I. The defendant denies that said [*subject of bailment*] was the property of said [*alleged bailor*], or that it was deposited with the defendant by him or his agents.

II. That the same was the property of one M.... N...., to whom the possession of it belonged when this action was brought.

III. That before the commencement of this action the defendant had, on the demand of said M.... N...., the true owner, delivered the same to him.

1566. That bailment is held as a pledge.

I. The defendant alleges that on or about the day of, 19.., the defendant loaned to the plaintiff the sum of dollars, which loan is still due and unpaid, and that the said [*property bailed*], was thereafter [*or at the time of said loan*], delivered by the plaintiff to the defendant as security for the repayment of said loan, and is still held by the defendant for that purpose.

1567. Denial that defendant was a common carrier.

The defendant denies that he is or was at the time mentioned in the complaint, a common carrier.

1568. Denial of employment.

The defendant denies that he ever undertook or agreed to safely carry the said goods to or to deliver them there to, or that the plaintiff ever paid them any reward for any such service, or ever agreed to pay any such reward.

1569. Denial of delivery of goods.

The defendant denies that the plaintiff ever delivered to him the goods mentioned in said complaint, or that he received the same.

1570. Denial of loss.

The defendants deny that the said goods were lost to said through any negligence or misbehavior of the defendants, and deny that they have any knowledge or information sufficient to form a belief whether the said goods were ever lost to said

1571. That the contract was special.

That the goods mentioned in the complaint were delivered by the plaintiffs to, and received by, the defendants, upon a special

contract between them, whereby it was provided that [*here set forth matter relied on, with averments bringing the goods within it*].

1572. That the damage was by plaintiff's fault (sustained by Hutchinson v. Guion, 28 L. J. (n. s.) C. B. 63).

I. The defendant alleges that the goods mentioned in the complaint, called, were a corrosive and destructive substance, rotting casks and cask-hoops, and other substances in contact with it, which the plaintiffs knew, but which the defendant did not know, and could not reasonably be expected to know.

II. That the plaintiffs did not inform the defendant of the destructive nature of the goods, and negligently delivered the same to the defendant in bulk, and thereby induced the defendant to believe that the same might be placed in contact with casks, cask-hoops, and other substances, safely; and they in consequence stowed the same among, whereby the injury complained of was caused, and not otherwise.

1573. That the goods were lost by a risk for which defendants were not liable (sustained by Dorr v. N. J. S. N. Co., 11 N. Y. 485).

I. The defendants allege that the merchandise mentioned in the complaint was delivered by the plaintiffs to the defendants, and by them received on board the steamer Lexington, under and in pursuance of a special contract made between them for the transportation of the same from New York to Stonington, of which the following is a copy [*copy of the contract*].

II. That while the merchandise was well and properly stowed on board the steamboat, and being carried pursuant to the contract, and without any carelessness or misconduct of defendants or their servants, or any defect of the boat or its equipments, the boat, by mere casualty and accident, took fire, and was consumed, with its cargo, including the merchandise of the plaintiffs; and thereby, by accident and casualty of fire, and not by any negligence, misconduct, or default of the defendants, the merchandise was not delivered at Stonington, and became lost to the plaintiffs.

1574. That the value of the goods lost was agreed on.¹

I. The defendant alleges that at the time of the delivery of said property by the plaintiff to the defendant a written contract

¹ An agreement, fixing the value of the property at or not exceeding a certain sum is valid, but an arbitrary stipulation restricting

damages in case of loss is invalid. Ullman v. C. & N. W. Ry. Co., 112 Wis. 150.

was entered into between the parties, by which it was mutually agreed, as a part of the contract of carriage, that the true value of said property was dollars [*or, did not exceed the sum of dollars, and that the liability of defendant in case of loss or injury should not exceed that sum*] [*or set forth copy of the contract*].

II. That previous to the commencement of this action the defendant duly tendered to the plaintiff the said sum of dollars, but that plaintiff refused to accept the same, and the defendant has kept the said tender good, and now brings the said sum into court for the use of the said plaintiff, and in continuance of said tender.

1575. Denial of trust.

That the plaintiff did not deliver, and the defendant did not receive, the said bond and mortgage, upon the trust and confidence alleged; but the defendant received the same as and for his own property, absolutely, and without any trust thereto attached.

CHAPTER CVII.

DEFENSES IN ACTIONS AGAINST SHERIFFS.

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|--|--|
| 1576. Denial of plaintiff's title. | 1580. Justification under attachment. |
| 1577. Denial of taking. | 1581. Allegation of fraudulent assignment. |
| 1578. Justification of taking under writ of replevin. | 1582. Return of debtor after escape. |
| 1579. Justification under an execution against a third person. | |

1576. Denial of plaintiff's title.¹

The defendant denies that [he has any knowledge or information sufficient to form a belief] that at the time alleged in the complaint, or at any other time, the plaintiff was lawfully, or otherwise, possessed of the goods and chattels mentioned and described in the complaint, or any or either of them, or any part thereof; or that the said goods, and chattels, or any or either of them, or any part thereof, were then, or ever since have been, or now are, the property of the plaintiff, or that the same were or are of the value of dollars, or that said property composed the stock of goods in the store of the plaintiff at the place alleged in the complaint, or at any other place.

1577. Denial of taking.

The defendant denies that at the time alleged in the complaint, or at any other time at the place alleged in the complaint, or at any other place, the defendant wrongfully took the said goods and chattels from the possession of the plaintiff, or that he still unjustly detains the same, to the damage of the plaintiff dollars, or any other sum, or that by reason of the taking alleged in the complaint, or of any act or acts of the defendant, the plaintiff has sustained damage to the amount of dollars, or any damage whatever.

¹ If the defendant took the property from the plaintiff's possession it will be necessary to plead title in a third person under

whom he shows himself entitled to hold the same, in addition to a denial of plaintiff's title.

1578. Justification of taking under writ of replevin.

I. The defendant alleges that at the time mentioned in the complaint the defendant was the sheriff of the county of in this state, duly elected [*or appointed*] qualified and acting as such.

II. That in an action brought by one M.... N.... against one O.... P.... in the court of to recover the possession [among other things] of the property mentioned in the complaint in this action, said M.... N.... delivered to this defendant a duly executed affidavit for replevin, as required by law, made by him [*or made in his behalf*] and a notice indorsed thereon, describing the property mentioned in the complaint, and requiring this defendant to take the same from said O.... P...., and delivered it to said M.... N....; and at the same time delivered to this defendant, as such sheriff, a written undertaking as required by law in such case, of which affidavit, notice, and undertaking copies are hereto annexed as a part of this answer [*or otherwise fully and accurately describe the papers made necessary by the statute of the particular state to justify a seizure of the property in an action of replevin or an action for claim and delivery*].

III. That by virtue of said proceedings the defendant took and detained the goods mentioned in the complaint, which are the acts of which the plaintiff complains.

1579. Justification under an execution against a third person.

And for a further and separate defense, the defendant denies the allegations of the complaint in manner and form as therein alleged, and alleges:

II. That heretofore, in an action in the court of, wherein M.... N.... was plaintiff and O.... P.... was defendant, judgment was, on or about the day of, 19.., duly rendered in favor of the said M.... N...., plaintiff in said action, against the said O.... P.... the defendant therein, for the sum of dollars, as by the judgment-roll in said action, on file in the office of the clerk of said court, more fully appears.

III. That afterwards, and upon the day of, 19.., a transcript of the said judgment was duly filed, and the said judgment was duly docketed in the office of the clerk of the county of and afterwards, upon the same day, an execution against the property of O.... P...., based upon the said judgment, was issued in due form of law, directed to and delivered to this defendant as sheriff of the said city and county of, for service; whereby, after containing the statement and

recital of the matters by law required to be stated and set forth in such case, and after setting forth that the sum of dollars was then actually due on the said judgment, this defendant was in substance commanded to satisfy the said judgment out of the personal property of the said judgment-debtor within this defendant's county; or if sufficient personal property could not be found, then out of the real property in his county belonging to such judgment-debtor on the day when the said judgment was so docketed in his county, or at any time thereafter, in whose hands soever the same might be, and to return the said execution within sixty days after its receipt by him, as required by law [*or otherwise properly set forth the contents of the execution or other writ, according to the statute of the particular state*].

IV. That, under and by virtue of the said execution, this defendant, as sheriff of the county of and not otherwise, by one of his general deputies, levied upon certain goods and chattels of the character and description of those mentioned and described in the complaint, and took the same into his custody, a schedule of which property so levied upon and taken is hereunto annexed as a part of this answer, and marked "A," which defendant believes to be a portion of the goods and chattels referred to in the complaint, and that the said levy and taking and detention as aforesaid constitute the supposed wrongful taking in the complaint alleged.

V. But this defendant, upon his information and belief, alleges that the goods levied on as aforesaid were at the time of said levy the property of the said O.... P.... or the said O.... P.... had an interest therein liable to levy and sale under execution.

1580. Justification under attachment.

I. [*As in last preceding form.*]

II. The defendant alleges, upon information and belief, that heretofore, to-wit, on or about the day of, 19.., in a certain action theretofore brought in the court of county, wherein one E.... F.... was plaintiff and G.... H.... was defendant, a warrant of attachment was duly and regularly issued out of said court and directed and delivered to this defendant, commanding and requiring this defendant as sheriff aforesaid, to [*here set forth commands of writ*] [*or, of which warrant a copy is attached hereto marked Exhibit A, and made part hereof*].

III and IV. [*As in IV and V of last preceding form, with necessary incidental changes.*]

1581. Allegation of fraudulent assignment.

I. [*Allege facts showing that defendant was and is a creditor of the assignor, and the judgment obtained, if any.*]

II. That the plaintiffs were possessed of said goods under and by virtue of a pretended assignment thereof by said [*debtor*] to them for the benefit of his creditors, dated on or about the day of, 19..

III. That the same was executed by said [*debtor*] with intent to hinder, delay and defraud his creditors, and that no bond was executed or filed by the said plaintiffs upon receipt of said assignment, as required by [*name the statute*] [*or otherwise state the defects in the assignment according to the fact*], and that the said assignment was fraudulent and void as against this defendant and other creditors of said [*assignor*].

1582. Return of debtor after escape.

I. That the said M.... [*the prisoner*] wrongfully, and without the privity of the defendant, escaped from his custody.

II. That before the commencement of this action, to-wit, on the day of, 19.., the said M.... voluntarily returned into the defendant's custody [*or, upon fresh pursuit the defendant retook said M.... into his custody*], where he ever since has remained by virtue of the process mentioned in the complaint.

CHAPTER CVIII.

DEFENSES IN ACTIONS OF DECEIT.

1583. Denial of sale of goods.

1584. Denial of representations alleged.

1585. Admission of certain representations and denial of their falsity.

1583. Denial of sale of goods.

The defendant denies that he at any time sold the [*describe property*] to the plaintiff as alleged in the said complaint.

1584. Denial of representations alleged.

The defendant denies that he at any time made any of the representations to the plaintiff alleged in the complaint.

1585. Admission of certain representations and denial of their falsity.

The defendant admits that he stated and represented to the plaintiff that [*here state representations admitted*] and alleges that the said representations so made were in fact true, and the defendant denies that he at any time made any other or different representations than those herein admitted.

CHAPTER CIX.

DEFENSES IN ACTIONS FOR NEGLIGENT INJURIES.

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| <p>1586. Denying injury and defendant's negligence.</p> <p>1587. Admitting the fact of injury, but denying defendant's negligence.</p> <p>1588. Another form, alleging defendant's due care and plaintiff's contributory negligence.</p> <p>1589. Collision in highway, alle-</p> | <p>gation of plaintiff's negligence.</p> <p>1590. Negligence of a fellow servant.</p> <p>1591. Contract relieving defendant from liability for ordinary negligence.</p> <p>1592. Denial of ownership or control of place or instrument of injury.</p> |
|---|---|

1586. Denying injury and defendant's negligence.

The defendant denies that he has any knowledge or information sufficient to form a belief that plaintiff was injured, as alleged in said complaint, and denies * that either this defendant or his servants were in any respect negligent in the construction or operation of said machine [*or otherwise negative the particular negligence charged*], or that the plaintiff's said injury, if any was in fact received by him, was caused or contributed to by any negligence on the part of the defendant or his servants.

1587. Admitting the fact of injury, but denying defendant's negligence.

The defendant admits that the plaintiff was injured at the time and place in said complaint alleged, but defendant denies that he has any knowledge or information sufficient to form a belief as to whether said injury was in any respect serious or resulted in a broken leg [*or otherwise, according to allegations of the complaint*], as alleged in the complaint; and defendant denies [*proceed as in last preceding form after the **].

1588. Another form, alleging defendant's due care and plaintiff's contributory negligence.¹

[*After denying or admitting the injury, as in either of two preceding forms, proceed*]: and defendant alleges that the de-

¹ Contributory negligence is generally held to be an affirmative defense, and should be alleged in the answer unless it is negatived

by the complaint, in which case a denial of the allegations of the complaint will suffice.

fendant and his servants used due care and diligence [about the construction of the said building, *or*, in repairing said street, and replacing the pavement thereof, *or*, in guarding the said excavation with proper bulwarks, and in putting up lights during the night-time, *or otherwise according to the allegations in the complaint*] and that said injury, if any was in fact received, was not caused by any negligence on the part of the defendant or his servants, but was caused [*or*, directly contributed to] by the negligence and want of ordinary care on the part of the plaintiff.

1589. Collision in highway, allegation of plaintiff's negligence.

That at the time mentioned in the complaint the defendant was driving his said gig in the highway, and the horse of the plaintiff, being at the same time there, was so carelessly, negligently, and improperly managed by the plaintiff, that by reason thereof the gig of the defendant, without any fault on the part of the defendant, and by want of due care in the management of his horse by the plaintiff, was driven against said horse, and thereby said horse sustained the injury alleged; and that if any damage happened to said horse, it was caused by the plaintiff's said negligence, and not by the fault of the defendant.

1590. Negligence of a fellow servant.

The defendant, further answering, alleges that the injuries received by the defendant [if any were in fact received], were caused solely by the negligence and want of ordinary care of one C.... D...., who was then a fellow-servant of the said plaintiff in the employ of the defendant, and not otherwise.

1591. Contract relieving defendant from liability for ordinary negligence.

I. The defendant alleges that prior to the happening of the said accident set forth in the complaint, and as part of the contract of employment entered into between the plaintiff and defendant, the said plaintiff entered into a written contract of which a copy is hereto annexed and made part hereof, marked Exhibit A, and that said contract was in full force and effect at the time of the said accident.

II. That the said accident, and resulting injuries to the plaintiff, were in fact caused by [*here set forth cause of accident, bringing it within the causes for which the agreement exempts the defendant from liability*].²

² See on this subject, *Peterson v. C. & N. W. Ry. Co.*, 119 Wis. 197.

1592. Denial of ownership or control of place or instrument of injury.

The defendant denies that at the time of the injuries alleged in the complaint the defendant was the owner or had possession or control of the premises in which the said hole or hatchway was [*or, of the said wagon which caused the said injury, or otherwise describe the instrument of injury according to the fact*].

CHAPTER CX.

DEFENSES IN ACTIONS OF CONVERSION OR FOR INJURIES TO PERSONAL PROPERTY.

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| 1593. Denial of plaintiff's ownership. | 1599. Attorney's lien for services. |
| 1594. Denial of the bailment. | 1600. Denial of assignment of cause of action for conversion. |
| 1595. Denial of conversion. | |
| 1596. Denial of detention. | 1601. That the goods were seized under an attachment, and that the plaintiff is a fraudulent grantee. |
| 1597. That defendant has a lien on the goods by a pledgee. | |
| 1598. That defendant has a lien for labor. | 1602. Killing dog worrying sheep. |

1593. Denial of plaintiff's ownership.

The defendant denies that at the time of the alleged conversion the plaintiff was the owner, or entitled to the possession, immediate or otherwise, of the goods mentioned in the complaint.

1594. Denial of the bailment.

The defendant denies that he ever received the plaintiff's goods mentioned in the complaint, as alleged therein.

1595. Denial of conversion.

The defendant denies that he at any time took or converted to his own use the said property described in the complaint, or ever refused to deliver the same to the plaintiff.

1596. Denial of detention.

The defendant denies that he now does or at any time did detain the said goods [or deeds], or any or either of them, from the plaintiff, as alleged in said complaint.

1597. That defendant has a lien on the goods by a pledge.

The defendant denies that at the time he received said goods, on or about, 19 . . . , it was agreed between the plaintiff and the defendant, in consideration of the defendant's advancing to the plaintiff dollars, that the defendant should have a lien on the said goods and deeds until repayment thereof, with interest; that the defendant advanced to the plaintiff dollars, but the plaintiff has not repaid the same, with

interest [*or*, has only repaid the sum of dollars of said loan], leaving dollars, with interest from, 19..., still owing thereon. Wherefore the defendant detained [*and still detains*] the said goods and deeds.

1598. That defendant has a lien for labor.

The defendant alleges that said wagon was delivered by the plaintiff to the defendant, who is and was a wagon maker, on or about the day of, 19..., for the purpose of being repaired, and was in fact repaired by the defendant, and that the reasonable value of said repairs was the sum of dollars, no part of which sum has been paid by the plaintiff, though often demanded, and that the defendant now holds and detains said wagon by virtue of his lien thereon for the amount of said repairs, and not otherwise.

1599. Attorney's lien for services.

I. The defendant alleges that he is and was at all times hereinafter mentioned an attorney at law, duly admitted and practicing as such at and that the plaintiff on or about the day of, 19..., retained the defendant as such attorney to prosecute a certain action against one E.... F.... [*or otherwise state the character of the business*].

II. That at the time of such retainer, and in pursuance thereof, the plaintiff deposited with the defendant, as such attorney, the said deeds [*or other papers*] mentioned in the complaint, and that thereafter the defendant performed legal services in the prosecution of said action for the plaintiff, which were reasonably worth the sum of dollars, and necessarily advanced and expended for traveling expenses, officers' fees and other necessary expenses, at plaintiff's request, the sum of dollars, no part of which sums have been paid to the defendant [except the sum of dollars], though often demanded.

III. That defendant now holds and retains said papers by virtue of his lien thereon for the said services and disbursements, amounting to dollars, and not otherwise.

1600. Denial of assignment of cause of action for conversion.

The defendant denies that [he has any knowledge or information sufficient to form a belief that] the said M.... N.... and O.... P.... ever assigned to the plaintiff their right, title and interest in and to the [trunk, and the contents thereof] mentioned in the complaint; or in and to any claims, demands, or causes of action arising to said M.... N.... and O....

P...., or either of them, for the alleged detention or loss of said [trunk and contents].

1601. That the goods were seized under an attachment, and that the plaintiff is a fraudulent grantee.

I. That one M.... N...., on the day of, 19.., was indebted to the defendant in the sum of dollars, over and above all legal set-offs, and departed out of the state, or kept concealed within it, with intent to defraud his creditors of their just demands, or to avoid being arrested by the ordinary process of law [*or otherwise, according to the statute of the particular state*].

II. That the defendant applied [*stating the proceedings to obtain an attachment against M.... N...., pursuant to the law of the state*]; that a warrant of attachment was duly issued by the said judge to the sheriff of the county of commanding him to attach all the property of the said M.... N...., which warrant was delivered to one O.... P...., a deputy sheriff of said county, to be executed in due form of law.

III. That the plaintiff, on the day of, 19.., was possessed of the said nine horses, by virtue of a conveyance thereof, made to him by the said M.... N...., with the intent to defraud the creditors of the said M.... N.... of their just debts [*here state facts showing fraudulent intent*].

IV. That the deputy sheriff, by virtue of the said warrant, and the defendant, in aid and by the command of the said deputy sheriff, did attach, and for the space of two days did safely keep, the said horses as and for the proper goods and chattels of the said M.... N...., which is the same trespass complained of by the plaintiff.

1602. Killing dog worrying sheep (Wis. Stats. 1898 sec. 1621).

The defendant alleges that on the day of, 19.., and before the committing of the said trespasses in said complaint mentioned, the said dog of the said plaintiff was found, by this defendant, worrying, wounding and killing the sheep of him, the said defendant [*or, the sheep of one M.... N....*]; and thereupon the said defendant, on the day of, 19.., duly notified the said plaintiff of the said worrying, wounding and killing of said sheep by said dog. That thereafter and on the day of, 19.., and more than twenty-four hours after the giving of said notice, the defendant found the said dog out of the plaintiff's enclosure and out of the immediate care of the said plaintiff, his owner and keeper, and thereupon killed the said dog, as he lawfully might.

CHAPTER CXI.

DEFENSES IN ACTIONS OF REPLEVIN.

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| 1603. General denial. | 1607. Lien for services. |
| 1604. Defendant part owner. | 1608. By sheriff, justifying under an attachment. |
| 1605. Title in defendant or in a stranger. | 1609. That the property was distrained, doing damage. |
| 1606. Lien for storage or freight. | |

1603. General denial.¹

The defendant, answering the complaint of the plaintiff herein, denies each and every allegation in said complaint contained.

1604. Defendant part owner.

That at the several times mentioned in the said complaint, one undivided half of the said goods and chattels was, and still is, the property of this defendant, and not of the plaintiff; and the whole of said goods and chattels then were rightfully in the possession of this defendant.

1605. Title in defendant or in a stranger.

That the goods mentioned in the complaint were the property of the defendant [or, the property of one M.... N....], at the time mentioned in the complaint, and not the property of the plaintiff [and that the defendant took and retains possession of the said property by authority and direction of the said M.... N....]

1606. Lien for storage or freight.

I. That on the day of, 19.., the plaintiff deposited the goods mentioned in the complaint with the defendant, who was then and still is a warehouseman, for storage [or, delivered the goods mentioned in the complaint to the defend-

¹ A general denial in replevin puts in issue all the facts, and under it the defendant may show title in himself or a stranger, or that defendant never had possession or any other fact which defeats plaintiff's title or right of

possession. *Timp v. Dockham*, 32 Wis. 146. It is believed to be advisable, however, to specially plead such facts, and necessary to do so where the goods were taken by the defendant from plaintiff's possession.

ant, who was then and still is a common carrier for hire, to be carried to], agreeing to pay for the same cents per ton [per month].

II. That the defendant duly performed all the conditions of the contract on his part, and has always been, and still is, ready and willing to deliver the said goods to the plaintiff upon payment of the money due for storage [*or* freight], to-wit, the sum of dollars.

III. That the plaintiff has not paid or tendered the same; wherefore, the defendant detained [and still detains] said goods, as he lawfully might do.

1607. Lien for services.

I. That said goods were manufactured by the defendant, as a carpenter and joiner; and that he detained them by virtue of his lien as a mechanic, and the manufacturer thereof, as security for the payment of dollars, the money due him from the plaintiff for work and labor in manufacturing them.

II. That said sum is still due from the plaintiff therefor, and unpaid; wherefore, the defendant detained [and still detains] said goods, as he lawfully might do.

1608. By sheriff, justifying under an attachment.

I. Denies that he wrongfully detains from the plaintiffs the four cases and two casks containing the goods and chattels mentioned and described in the complaint, or any or either of them, or any part thereof; and he has no knowledge or information sufficient to form a belief, that the said goods and chattels, or any, or any part thereof, were or are the property of the plaintiffs, or that the same were or are of the value of dollars, or that by reason of the detention alleged in the complaint, or of any act of the defendant, the plaintiff has sustained any damage.

II. And further answering, this defendant, upon his information and belief, avers that on the day of, 19.., M.... N...., was indebted to O.... P.... in a cause of action arising upon contract, in the sum of dollars, with interest thereon from the day of, 19.., and on or about the said day of, 19.., the said O.... P.... commenced an action in the court of the state of against the said M.... N.... for the recovery of the said money and interest, and issued to this defendant a summons in due form for service; and on the same day made application to J.... K...., one of the justices of said court, for a warrant of attachment against the property of the said M.... N....,

and presented to the said justice, on the said application, an affidavit or affidavits, whereby it appeared that a cause of action existed against the said M.... N...., specifying the amount of the said claim, and the grounds thereof; and that the defendant was not a resident of the state of but resided at in the state of and that a summons had been issued to the sheriff of the city and county of; and at the same time presented to the said justice an undertaking as required by law, with sufficient surety, to the effect that if said defendant in said action recovered judgment, the plaintiff therein would pay all costs that might be awarded to the said defendant, and all damages which he might sustain by reason of such attachment, not exceeding the amount specified in such undertaking, and the amount specified in such undertaking was at least the sum of two hundred and fifty dollars [*or otherwise set forth the attachment proceedings, according to the laws of the state*].

III. That thereupon the said justice issued a warrant of attachment against the property of the said M.... N.... directed to this defendant, as sheriff of the city and county of, and required and commanded him to attach and safely keep all the property of the said M.... N...., within his county, or so much thereof as might be sufficient to satisfy the demand of the plaintiff in said warrant of attachment, of \$...., with interest thereon as aforesaid, being the amount of indebtedness stated in such attachment, together with all costs and expenses, and that this defendant proceed thereon in the manner required by law.

IV. That the said warrant of attachment was delivered to and received by him as such sheriff as aforesaid, for service on the day of, 19...; and under and by virtue of said warrant of attachment, he forthwith levied upon and attached four cases and two casks of the character and description of those mentioned and described in the complaint, and took the same in his custody, which the defendant believes to be the goods and chattels referred to in the complaint, and that the said attaching and taking as aforesaid constitute the supposed wrongful detention in the complaint alleged.

V. This defendant, upon his information and belief, avers that the said goods and chattels so attached and taken as aforesaid were, at the time of said attaching and taking, the property of the said M.... N...., or that the said M.... N.... had a leviable or attachable interest therein, or that said goods and chattels were liable to be levied upon, and taken under and by virtue of said attachment.

1609. That the property was distrained, doing damage.²

I. That at the times mentioned in the complaint, this defendant [*or*, one M.... N....] was lawfully possessed of the real property upon which the [*cattle*] therein mentioned were taken, to-wit, a certain meadow, called [*or otherwise identify it*] situate at

II. That the [*cattle*] alleged in the complaint to have been taken and carried away by this defendant were, at the time therein stated, wrongfully upon said premises of the defendant [*or* of said M.... N....] and then incumbering the same and doing damage thereon.

III. That [acting by command of said M.... N....] this defendant then and there took said property, and removed and carried the same away to a convenient distance, doing no unnecessary damage thereto, and there left the same for the use of the plaintiff.

IV. That these acts are the same of which the plaintiff complains.

² It is sufficient to allege that the defendant or person by whose command he acted was lawfully possessed of the real estate upon

which the distress was made, and that the cattle were at the time doing damage thereon. Wis. Stats. 1898 sec. 2679.

CHAPTER CXII.

DEFENSES IN ACTIONS FOR ASSAULT AND BATTERY.

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| 1610. Specific denial of battery. | 1616. The same, of an inn. |
| 1611. To preserve the peace. | 1617. The same, resistance of entry. |
| 1612. Plaintiff the aggressor (son assault demesne). | 1618. Justification of removing plaintiff from railroad car for non-payment of fare. |
| 1613. The same, a shorter form. | |
| 1614. To preserve the peace. | |
| 1615. Defense of possession of his dwelling. | |

1610. Specific denial of battery.

The defendant denies that he at any time struck, wounded or assaulted plaintiff, as in said complaint alleged.

1611. To preserve the peace.

I. [*Deny allegations of the complaint as to beating and wounding.*]

II. The defendant further alleges that at the time mentioned in the complaint the plaintiff had made an assault on one M. . . . and was then and there beating him [*or, the plaintiff and one M. . . . in breach of the peace, were fighting together*].

III. That thereupon the defendant, in order to preserve the peace and prevent the plaintiff from further so doing [*or, in order to preserve the peace and to separate them*], gently laid his hands upon the plaintiff, as he lawfully might.

IV. That thereupon the plaintiff [*here may allege assault upon this defendant, and his self-defense, as in next following form*].

V. That the acts above mentioned are the same of which the plaintiff complains.

1612. Plaintiff the aggressor (son assault demesne).

I. That at the time mentioned in the complaint, and just before the time of the commission of the alleged grievances therein stated, the plaintiff made an assault [*state it as if in a complaint against him*] upon this defendant, and would have beaten and greatly bruised [*or otherwise injured*] him, if he had not immediately defended himself; wherefore he did defend himself, as he lawfully might, and in so doing did neces-

sarily and unavoidably a little beat and bruise [*or otherwise injure*] the plaintiff; and that if the plaintiff sustained any damage, it was occasioned by his first assaulting the defendant.

II. That the acts above mentioned are the same of which the plaintiff complains.

III. This defendant denies each and every allegation of the complaint, except such as are hereinbefore admitted.

1613. The same, a shorter form.

That the plaintiff first assaulted and beat the defendant, who thereupon necessarily committed the acts complained of in self-defense.

1614. To preserve the peace.

I. That as to the alleged assaulting, beating, and ill-treating the plaintiff, the defendant was, at the time thereof, captain of the ship [*or vessel, or, steamboat*] called the

II. That the plaintiff was then on board of said ship [*or vessel, etc.*] making a great noise and disturbance, and fighting with a certain other person, to-wit, one M.... N...., whom he was striving to beat and wound.

III. Wherefore the defendant, for the preservation of the peace, and to preserve due order on said ship [*or vessel, etc.*], and to separate the said plaintiff and said other person so fighting together, and to prevent the said plaintiff from beating, wounding, and ill-treating such other person, as he would otherwise have done, then, as such captain, gently laid his hands upon the plaintiff, as he lawfully might, for the cause aforesaid; which are the acts of which the plaintiff complains.

1615. Defense of possession of his dwelling.

I. [*Deny beating and wounding.*]

II. The defendant further says, that at the time mentioned in the complaint the defendant was lawfully possessed of [*here designate the dwelling*].

III. That the defendant being so possessed thereof, the plaintiff was unlawfully therein, and making great noise and disturbance therein, against the will of the defendant, and disturbing him and his family in the enjoyment of their dwelling; and refused to cease such noise and disturbance, and to go away, although requested by the defendant.

IV. That thereupon the defendant, in defense of the possession of his dwelling, gently laid his hands upon the plaintiff in order to remove him, as he lawfully might.

V. That the acts above mentioned are the same of which the plaintiff complains.

1616. The same, of an inn.

I. [*Deny beating and wounding.*]

II. That at the time mentioned in the complaint the defendant was lawfully possessed of a certain public house [*designate it*].

III. That the plaintiff came into the said house, and then and there made a great noise and disturbance therein, to the disquiet of other persons lawfully there, and of the defendant and his family, in their enjoyment therein, and refused to depart therefrom or cease said disturbance, though requested by the defendant so to do.

IV. [*Continue as in preceding form.*]

1617. The same, resistance of entry.

I and II. [*As in preceding forms.*]

III. That the plaintiff then and there, with force and violence, attempted to break into the said dwelling [*or other possession*], without the leave and against the will of the defendant.

IV. That the defendant thereupon, in order to preserve the peaceable possession thereof, resisted the plaintiff's entrance, and in doing so necessarily assaulted and beat the plaintiff, as he lawfully might; and if the plaintiff sustained any damage, it was occasioned by his own wrong.

V. That the acts above mentioned are the same of which the plaintiff complains.

1618. Justification of removing plaintiff from railroad car for non-payment of fare.

I. That the defendant was, before and at the time when the said grievances were committed, the conductor, and had charge of a passenger-train on the railroad of the Railroad Company, running from to

II. That one of the regulations of said railroad company was, that no person should be permitted to be, and remain, on such train without having a ticket therefor, duly obtained of their authorized agents.

III. That at the time mentioned in the complaint the plaintiff was on the said train, without having a ticket therefor as aforesaid, and upon demand made by this defendant refused to pay any fare in cash.

IV. That the defendant then and there requested the said plaintiff to leave the said train, which the plaintiff refused to

do; whereupon the defendant then and there gently laid his hands upon the said plaintiff, and removed him from the train, doing no unnecessary violence, as he lawfully might do; which is the act complained of by the plaintiff.

[V. That the defendant so removed the plaintiff from said train at the station of which is one of the usual stopping places on said railroad, *or*, near the dwelling house of one]¹

¹ If the statute limits the places where a passenger may be put off for non-payment of fare, the answer should show compliance therewith. Wis. Stats. 1898 sec. 1818.

CHAPTER CXIII.

DEFENSES IN ACTIONS OF FALSE IMPRISONMENT AND MALICIOUS PROSECUTION.

1619. Denial that defendant caused arrest.	an arrest for breach of peace.
1620. Denial of want of probable cause.	1624. The same, of arrest under criminal process.
1621. Justification of arrest upon suspicion of a felony.	1625. The same, of arrest and imprisonment under civil process.
1622. Justification by officer, of the same.	1626. The same, under order of arrest.
1623. Justification by officer, of	

1619. Denial that defendant caused arrest.

The defendant denies that he caused or procured said order of arrest [*or, said process*], to be issued.

1620. Denial of want of probable cause.

The defendant denies that he falsely and maliciously, or without probable and reasonable cause, caused the said plaintiff to be arrested.

1621. Justification of arrest upon suspicion of a felony.

I. That immediately before the time mentioned in the complaint, a felony was committed [*here briefly state the felony and causes of suspicion against the plaintiff*].

II. That thereupon the defendant, having reasonable cause to suspect the plaintiff of having committed such felony *, arrested him and carried him before M.... N...., a justice of the peace of the town of [*or other magistrate*], to be dealt with according to law.

III. That the above acts are the same of which plaintiff complains.

1622. Justification by officer, of the same.

I. That at and immediately before the time mentioned in the complaint, the defendant was a constable of the town of [*or designate other official capacity*].

II. That he was then informed by [*here state sources of information*] that a felony had been committed, in the robbery of

[*here state felony, and the grounds of the suspicion of the plaintiff*].

III. That thereupon, believing such information to be true, and acting thereon, as was his duty to do [*continue as in the preceding form, from the **].

1623. Justification, by officer, of an arrest for breach of peace.

I. That at the time mentioned in the complaint [*here state a breach of the peace on the part of the plaintiff, according to the fact, e. g., as in forms in next preceding chapter*].

II. Thereupon the defendant Y.... gave charge of the plaintiff to the defendant Z.... [*the officer*] who was a constable [*or other officer of the peace*], [who then and there had view of the said breach of the peace committed by the plaintiff].

III. That the defendant Z.... [*the officer*], at the request of the defendant Y...., and the defendant Y.... assisting the defendant Z...., then and there gently laid their hands upon the plaintiff, in order to take him into the custody of such officer, and carry him before a justice of the peace [*or other magistrate*], for examination concerning the premises, and to be dealt with according to law.

IV. That the acts above mentioned are the same of which plaintiff complains.

1624. The same, of arrest under criminal process.

I. That before and at the time of the committing of the alleged trespasses, he, the said defendant, was a constable within and for the town of in the county of

II. That a warrant duly issued by one M.... N...., under his hand and seal, the said M.... N.... then being a justice of the peace within and for the said town of, and directed to any constable of said then was delivered to this defendant as such constable to be executed: whereby he was commanded to arrest the said plaintiff, and have him forthwith before said justice, or some other justice of the peace for said county of there to answer to the charge of having feloniously stolen and carried away the goods and chattels of one to the value of dollars [*setting forth the tenor or warrant according to its effect*] .

III. That by virtue of the said warrant so issued, he, the said defendant, did arrest the said plaintiff, and had him in his custody until he, as soon as he conveniently could, took the said plaintiff before the said justice of the peace, to answer to the complaint aforesaid, as will appear by his return, duly entered on the said warrant [*or, writ, etc.*], which are the acts of which the plaintiff complains.

1625. The same, of arrest and imprisonment under civil process.

I. That at the time mentioned in the complaint, the defendant Y.... [*the officer*] was a sheriff of the county of in this state.

II. That on the day of, 19.., the defendant X.... [*the one at whose suit the process was issued, or, if he is not made a defendant, one X...., naming the judgment-creditor*] duly recovered a judgment in the court of this state, in and for the county of against the said A.... [*the plaintiff in the present action*], for the sum of dollars, in an action in which the said A.... might have been arrested, as provided by the statutes of the state of, which judgment, at the time mentioned in the complaint, was in force, and wholly unsatisfied [*or, unsatisfied in part*].

III. That on the day of, 19.., an execution against the property of the plaintiff in this action was duly issued on said judgment, and afterwards was returned wholly unsatisfied [*or unsatisfied in part*].

IV. That afterwards, and on or about the day of, 19.., an execution against the person of the plaintiff in this action was duly issued upon said judgment, and delivered to the defendant Y.... [*the sheriff*] to be executed.

V. That by virtue of the said execution, and before the return-day thereof, the defendant Y.... gently laid his hands upon the plaintiff in order to arrest him, and take and detain him under the said execution, which is the same act of which the plaintiff complains.

VI. That the defendant Z...., by the command of the defendant Y...., and in his aid and assistance, did gently lay their hands upon the plaintiff in order to take him into custody; and the defendant Y.... detained him in custody under said execution, according to law; which acts are the same of which the plaintiff complains.

1626. The same, under order of arrest.

I. [*As in preceding form.*]

II. That on or before the time mentioned in the complaint, an order was duly made by the court of this state, in and for the county of [*or other court or officer*]; whereby [*here recite the commands of the order*].

III. That on, etc., said order was delivered to the defendant [*the officer*] to be executed.

IV. That by virtue of said order [*continue as in preceding form*].

CHAPTER CXIV.

DEFENSES IN ACTIONS FOR LIBEL AND SLANDER.

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| 1627. General outline form of answer, denial, justification and mitigation. | 1634. That the alleged libel was privileged communication. |
| 1628. Notice that matter already pleaded in justification will also be proved in mitigation. | 1635. The same, a shorter form. |
| 1629. Justification of charging plaintiff with corruption and extortion in a public office. | 1636. That the alleged slander was a privileged communication by a clerk to his employer. |
| 1630. Justification of charge of perjury. | 1637. The same, of a fair report of public official proceedings. |
| 1631. Justification and mitigation. | 1638. Another form. |
| 1632. Justification and denial of malice; in charge of larceny. | 1639. Privileged statement made in answer to business inquiries. |
| 1633. Mitigation, republication of news from other papers. | 1640. Privileged communication; petition to supervisors to revoke license of a disorderly house. |

In both of these actions the codes generally, if not universally, provide that the defendant may both allege the truth of the supposed defamatory matter, and at the same time allege mitigating circumstances to reduce the amount of damages, and his failure to prove the truth will not affect his right to insist upon the mitigating circumstances. These defenses should be pleaded separately, and mitigation should be pleaded only as a partial defense. Doubtless also the defendant may deny the slander and justify in the same answer, or may justify and plead privilege.

1627. General outline form of answer, denial, justification and mitigation.

The defendant, answering the complaint of the plaintiff, denies [*here deny publication or any other material fact or facts which are to be put in issue*].

II. For a second and further defense the defendant alleges [upon information and belief] that the said supposed defamatory words set forth in the complaint herein are true; that, on or about, 19.., and prior to the alleged time of the

speaking [or publishing] of said words the plaintiff feloniously stole and carried away the property of defendant, of the value of dollars, and that the said so stolen is the same property referred to in the alleged slanderous words set forth in plaintiff's complaint.

III. And for a partial defense, and by way of mitigation of damages, the defendant alleges [*here set forth want of malice, provocation, republication of current news, honest belief in truth, with facts on which it was based, etc.*].

1628. Notice that matter already pleaded in justification will also be proved in mitigation (sustained in Howard v. Raymond, 11 Abb. Pr. 155).

And in mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the publication of said supposed libelous article, this defendant repeats and renews, all and singular, the matters stated under the second defense herein; and will give evidence thereof in mitigation of damages, as well as in justification.

1629. Justification of charging plaintiff with corruption and extortion in a public office.

The defendant answers the complaint of the plaintiff herein, as follows:

For the first defense.—I. The defendant denies knowledge or information sufficient to form a belief, whether the plaintiff was ever at any time a harbor-master of the port of New York, or was ever duly nominated and appointed such harbor-master, as alleged in the complaint; but defendant admits that at the times referred to in the complaint, plaintiff was acting as harbor-master of said port. The defendant admits that the lawfully appointed harbor-masters of the port of New York have each of them, within the district to which he is specially appointed and assigned, such power and authority as are in the complaint alleged; but defendant denies knowledge or information sufficient to form a belief, whether plaintiff ever had lawful right or appointment to exercise such powers and authority as harbor-master.

II. Defendant denies that the plaintiff had, prior to this action, earned or maintained a good reputation, name, or fame, or that he enjoyed the confidence of his superiors, or that of the public or of his neighbors in the duties of said office, or that he enjoyed or maintained a good character or reputation; and defendant says, that at the times hereinafter mentioned, plaintiff had been guilty of the malpractice and misconduct hereinafter

mentioned, and of taking the excessive and illegal fees herein-after mentioned; and that by reason thereof he became, and was, at all the times mentioned in the complaint, a person of bad name, fame, and reputation.

III. Defendant denies all the allegations in the complaint contained, not hereinbefore specifically admitted.

Second defense.—I. The defendant, further answering, says, that the said supposed libelous matters set up in the complaint are true of the plaintiff, as follows:

II. That the plaintiff, prior to the day of, 19.., and while acting, or claiming to act, as harbor-master of the port of New York, was guilty of official misconduct in divers instances.

III. That by a rule prescribed by the captain of the port of New York, pursuant to authority vested in him by law, regulating the conduct of harbor-masters; which rule had for a long time been, and still was, on the said day of, 19... in force, and well known to plaintiff, harbor-masters were required to discharge their duties in person, and the appointment of a deputy by any harbor-master was prohibited. But notwithstanding this rule, and in violation thereof, the plaintiff at some time prior to said last-mentioned day, but at what precise date defendant does not know and cannot state, did corruptly and unlawfully conspire with, and pretend to appoint one N.... to act, or pretend to act, as deputy harbor-master under the plaintiff.

IV. That the plaintiff and N.... entered into an arrangement and understanding with each other, pursuant to which the plaintiff was accustomed for a long period prior to the day of, 19.., to direct persons applying to him as harbor-master for berths for vessels, to apply to said N...., and the said N.... was accustomed, with the knowledge and connivance of the plaintiff, to exact illegal and excessive fees for giving berths to vessels of such applicants.

V. That in many instances the plaintiff, and in other instances the said N...., under and in pursuance of the afore-said understanding and agreement between himself and the plaintiff, did exact from persons applying for berths for vessels illegal and excessive fees.

VI. That the plaintiff, on the day of, 19.., unlawfully exacted and received from U.... V...., coal merchants, doing business at the sum of dollars, for obtaining a berth for the coal-barge Z.... That on, or about, etc., W.... X...., clerk with Y.... & Z...., shipping merchants doing business at, applied to the plaintiff for

a berth for the ship Y.... That the plaintiff referred him to said N.... who, pursuant to the corrupt and unlawful agreement between N.... and the plaintiff above stated, exacted and received from him the sum of dollars, in addition to the fees allowed by law for giving said ship a berth [*other instances to be stated in a similar way*].

1630. Justification of charge of perjury.

That before the speaking [*or, publishing*] of the words alleged in the complaint, and at a term of the court, duly held at, in the month of, 19.., before one of the judges of the court, upon trial of an action there pending between one M.... N...., as plaintiff, and O.... P.... as defendant, A.... B...., the plaintiff in this action, appeared as a witness for and on behalf of the said M.... N.... and was then and there, in open court, duly sworn, and took oath to speak the truth, the whole truth, and nothing but the truth, touching and concerning the matters in question in the said issue.

II. That the plaintiff, being so sworn, falsely and wilfully, and maliciously deposed and gave evidence, among other things, that [*here set forth that part of the plaintiff's evidence in which he committed perjury*], and that the said plaintiff then knew the said evidence was false and untrue.

III. That in truth [*here negative the plaintiff's evidence, as in an indictment for perjury*].

IV. That the truth of the matters hereinbefore stated were material and pertinent to the issue there tried.

V. That this defendant, in charging the plaintiff with perjury, as alleged in the complaint herein, referred to the said evidence so falsely given by the plaintiff as above set forth.

1631. Justification and mitigation.

For a first defense the defendant alleges that the supposed defamatory words [*or, libel*] in the complaint set forth [and each allegation therein contained] are [is] true of the plaintiff, as follows: that is to say, that before the time alleged in the complaint as the time of speaking of the words [*or, of the publication of the supposed libel*] in the complaint set forth, to-wit, on the day of, 19.., at, the plaintiff did feloniously steal and carry away twenty-five bushels of corn, the property of this defendant.

Second. For a second defense, this defendant alleges:

I. That on the day of, 19.., at, this defendant and the plaintiff entered into an agreement that the plaintiff should take from this defendant a piece of land situate

in said city, and plant the same with corn, on shares with this defendant,—the plaintiff to be at all the labor and expense of planting said land with corn, and cutting, harvesting, and securing the same, and have as his remuneration therefor one-half of whatever corn should be raised upon said land; which corn was to be equally divided, in the ear, between the plaintiff and this defendant.

II. That the said land was accordingly planted and harvested by said plaintiff; but the said plaintiff, while cutting, harvesting, and securing said corn, or immediately after it was cut, harvested, and secured, instead of fairly and honestly dividing said corn equally with this defendant, fraudulently, dishonestly, and unfairly secreted, carried away, and converted to his own use, without the knowledge or consent of this defendant, a considerable quantity of said corn, with the intent to appropriate the same wholly to his own use, and to give no account thereof to the defendant.

III. That the same being discovered by the defendant, he did thereupon charge the said plaintiff with having stolen said corn, which the plaintiff admitted and confessed [and pretended to express great penitence therefor]; which above facts the defendant will give in evidence on the trial of this action, in mitigation of any damages the said plaintiff may be entitled to recover.

1632. Justification and denial of malice; in charge of larceny.

I. That each and every article in the complaint mentioned as having been charged by defendant to have been stolen by the plaintiff, had, at the time mentioned in the complaint, been taken and stolen from the said defendant.

II. That the defendant is informed and believes that the plaintiff has been, and is, guilty of each and every charge in said complaint alleged to have been made against her by the defendant; and that whatever the defendant has said of or concerning the plaintiff she has said in the full belief of its truth and verity, and in self-vindication and warning to others, and not from any motives of malice towards the plaintiff.

1633. Mitigation, republication of news from other papers (sustained in Howard v. Raymond, 11 Abb. Pr. 155).

The defendant, by way of mitigation of any damages to which the plaintiff might otherwise appear entitled by reason of the republication of said supposed libelous article, alleges that all the matters and things stated under the second defense were.

on the day of, 19..., currently reported and believed in the cities of New York and Brooklyn, and were published in a certain newspaper, called the N.... Z...., published in said city of and were so communicated to this defendant, and were published by him as matters of current public news, he verily believing the same to be true.

1634. That the alleged libel was a privileged communication.

That in the month of, 19..., at the city of New York, the plaintiff brought an action against this defendant in the court, for having, as alleged, maliciously, and without probable cause, prosecuted the said plaintiff on a charge of obtaining money by false pretenses, and this plaintiff was arrested in said action by an order of arrest issued therein.

II. That afterwards, on the day of, 19..., at said city, this defendant did, by his attorney, procure an order from one of the justices of said court, requiring the plaintiff to show cause, at a certain day and place therein named, why this defendant should not be discharged from said arrest, or why the sum in which he was held to bail should not be reduced.

III. That said order was granted upon an affidavit of this defendant, made in answer to an affidavit made by the plaintiff upon which the order of arrest aforesaid was granted, and for the purpose of procuring this defendant's discharge or a reduction of bail as aforesaid.

IV. That the supposed libel in the complaint set forth is a part of said affidavit of this defendant, and was published by him by the presentation of said affidavit to the court upon said motion, and not otherwise.

[V. This defendant denies that he published said supposed libel maliciously, or with the intent charged in the complaint.]

VI. That said supposed libelous matter was pertinent and relevant in said motion, and for the purpose of procuring the relief prayed for therein [*or*, That this defendant had reasonable cause for believing, and did in fact believe, at the time of said publication, that the same was true and pertinent, *etc.*, as above].

1635. The same, a shorter form.

That at the time of publishing the words mentioned in the complaint, an action was pending in the court, between [the parties to this action].

II. That at the time this defendant applied to A.... B...., a justice of the said court, for an order of; and upon his application presented to the said justice an affidavit containing

the words complained of, which affidavit was pertinent and relevant to the said application.

III. That the defendant did not in any other way publish the said words.

1636. That the alleged slander was a privileged communication by a clerk to his employer.

I. That he was, at the time of uttering the words mentioned in the complaint, the confidential clerk of A.... B....

II. That the said A.... B.... inquired of the defendant the character of the plaintiff [with a view to employing him as a clerk, *or otherwise*], and the defendant then stated to him the matter referred to in the complaint, and that the defendant did not make said statement to any other person, or otherwise publish said words.

III. That the defendant had probable cause for believing, and did believe, the same to be true.

1637. The same, of a fair report of public official proceedings.

I. That on the day of, 19.., in the course of a certain trial then pending in the court of wherein O.... P.... was plaintiff and R.... S.... was defendant, one M.... N...., counsel for said O.... P.... made a public statement or speech.

II. That the defendants, as publishers and proprietors of the N.... Z...., published in said newspaper a fair and true report of the judicial proceedings had upon such trial, and of the public statement or speech made as aforesaid in the course thereof, which publication is the same publication as that in the complaint set forth [*or, of which publication the supposed libelous article in the complaint set forth is a part*].

III. That defendants deny that they published the same maliciously, or with intent to injure the plaintiff, or with the intent charged in the complaint.

1638. Another form.

I. That on the day of, 19.., at an action was tried in the court of in which A.... B.... was the plaintiff, and the plaintiff herein was defendant [*or, an indictment having been found against the plaintiff for, he was tried therefor in the court of sessions for the county of, or otherwise*].

II. That the article published in the defendant's newspaper,

as stated in the complaint, was a fair and true report of the [testimony of one of the witnesses, named C.... D....] made in the course of the said trial.

III. [*May add paragraph III from preceding form.*]

1639. Privileged statement made in answer to business inquiries.

I. The defendant alleges that prior to the day of, 19.., the plaintiff had been in the employ of the defendant as a [bookkeeper] and that on or about said date the plaintiff was endeavoring to obtain a like position from one M.... N....; and the said M.... N...., knowing that the plaintiff had been in the defendant's employ, made certain inquiries of the defendant as to the character of the plaintiff and his ability as a bookkeeper, in response to which inquiries the defendant, as he lawfully might, wrote and sent to the said M.... N...., by mail, the letter set forth in the complaint, but did not publish the said letter nor disclose its contents to any other person nor in any other way than that above stated; that said letter was written and sent, and the statements therein made in full belief that the same were true and correct, and without malice on the part of this defendant, and the defendant alleges that said letter was and is a privileged communication.

1640. Privileged communication; petition to supervisors to revoke license of a disorderly house (adapted from *Werner v. Asher*, 86 Wis. 349).

I. The defendants admit that at the times stated in the complaint the plaintiff was a duly licensed saloonkeeper in the town of county of and that on the day of, 19.., these defendants signed a petition addressed to the board of supervisors of said town, in substance and effect like the petition set forth in said complaint, but defendants deny that they wrote said petition or published the same or any part thereof, save that they caused the same to be presented to the said town board of supervisors.

II. The defendants further allege that they reside in the immediate vicinity of the plaintiff's said saloon, and that for a long time prior to the making and presentation of said petition the plaintiff did not keep his said saloon in an orderly manner, and that rows and disturbances were very frequent therein, so much so that defendants were kept awake nights by the noise [*state fully the facts*].

III. That on account of the said disgraceful and boisterous disturbances in said saloon, these defendants signed the said petition for revocation of the plaintiff's license, and caused the same to be presented to the said board of supervisors without malice and in the full belief that the statements therein contained are true, and the defendants by reason of the facts above set forth allege that the making of such petition, and the presentation thereof to the said board of supervisors were privileged by law.

CHAPTER CXV.

ANSWERS IN ACTIONS FOR NUISANCE.

1641. Denial of plaintiff's title.		business, but denial that
1642. Denial of nuisance.		the same is a nuisance.
1643. Denial of building or main- taining dam.	1645. Prescriptive right to use water.	
1644. Admission of conducting	1646. License to maintain coal hole in sidewalk.	

1641. Denial of plaintiff's title.

The defendant alleges that the plaintiff was not at the times alleged in the complaint the owner of [*or, in possession of*] the premises described in the complaint, as therein alleged.

1642. Denial of nuisance.

The defendant denies that he has at any time maintained or operated a slaughter-house [*or other business according to the charge*], upon his said premises, as alleged in the complaint herein, or that said premises have at any time been used by any one for the purpose of a slaughter-house [*or other business*].

1643. Denial of building or maintaining dam.

The defendant denies that he at any time erected or maintained the said dam, as in said complaint alleged.

1644. Admission of conducting business, but denial that the same is a nuisance.

The defendant admits that at the times named in said complaint, he has operated a planing mill [*or tannery, or otherwise according to the fact*], upon the premises named in the complaint, but defendant denies that the operation of said planing mill [*or other factory*] caused offensive or unusual noises, or volumes of dust [*or otherwise specifically negative the nuisance charged in the complaint*], as alleged in said complaint, or that the same in any way interfered with the healthful enjoyment by the plaintiff or his said family of his said premises.

1645. Prescriptive right to use water.

The defendant alleges that at the times named in the complaint he was and still is the owner and in the possession of a

certain mill and dam situated upon [*describing the premises*], and that for more than twenty years prior to the commencement of this action this defendant and his grantors have continuously and without interruption exercised the right of diverting the water of said river by said dam, and using said water for the operation of said mill, and have thereby acquired the right to so direct and use said water, and that the acts complained of by the plaintiff herein consist in such proper diversion and use of said water.

1646. License to maintain coal hole in sidewalk (adapted from Jennings v. Van Schaick, 108 N. Y. 530).

The defendant admits that he owned the premises described in the complaint in fee, and that he caused to be placed in the sidewalk in front of said dwelling house a coal hole, which was provided with a cover, and guards in strict accordance in all respects with the requirements of a license or permission duly granted to the defendant by the duly constituted municipal authorities of the city of That the said coal hole, with its said cover and guards, was placed in said sidewalk by the defendant, in an absolutely safe condition, and in accordance with all the requirements of said license, and that said premises were thereupon and on or about, 19.., rented by the defendant to one X.... Y.... who thereupon took entire possession of said premises, and still retains the same, the defendant retaining no control or possession of the same. That defendant at no time had any notice or knowledge that the said coal hole was unsafe or out of repair, and the defendant alleges upon information and belief that if the said coal hole was at any time unsafe or out of repair, the same was due to the neglect and default of said [*tenant*], and not to any neglect or default on the part of this defendant.

CHAPTER CXVI.

DEFENSES IN ACTIONS FOR TRESPASS.

1647. Denial of title and possession.	1653. Justification of rebuilding fence.
1648. The same as to part.	1654. Justification of breaking plaintiff's house by virtue of search-warrant.
1649. Denial of trespass and taking.	1655. Justification of trespass to retake property.
1650. License.	1656. Justification on account of impassable highway.
1651. Prescriptive right by use for twenty years.	
1652. Justification of trespass by reason of defective fence.	

1647. Denial of title and possession.

The defendant denies that at the times named in said complaint, the plaintiff owned or possessed the lands described in said complaint.

1648. The same as to part.

I. The defendant alleges that at the times named in the complaint herein the following described part of the lands named in the complaint was not owned or possessed by the plaintiff, but was [and still is] owned and possessed by this defendant, viz. [description].

II. That the defendant at no time entered on any part of the land described in the complaint, except that part thereof herein described.

1649. Denial of trespass and taking.

The defendant denies that at the times named in the complaint, or at any other time, he broke or entered upon the said premises of the plaintiff, or took or carried away the property alleged in the complaint, or any part thereof.

1650. License.

I. That on the day of, 19.. [and at various times between that day and the day of, 19..] the plaintiff gave to this defendant license to enter [*etc., according to the fact*].

II. That under and in pursuance of said license of the

plaintiff, the defendant did enter [*etc., state act of defendant, according to the fact*], which acts are the same of which the plaintiff complains.

1651. Prescriptive right by use for twenty years.

I. The defendant alleges that at the place where it is alleged in the complaint that the defendant had erected the dam complained of, there had been erected and maintained by the defendant [*or, by one M.... N.... and by the defendant claiming under said M.... N....*], for more than twenty years before the time of the alleged grievances, a mill-dam upon and across the said creek, of the same or greater height, which set back the waters upon and flowed the premises, alleged in the complaint to have been in the possession of the plaintiff, to the same or greater extent, and caused the same or greater obstruction to the flow of water from the said last-mentioned mill, as was caused or made by means of the said dam and obstruction of the defendant mentioned in the complaint.

II. That said dam, and the water-power created thereby, were, and had been, during all the time above mentioned, held and enjoyed by [*said M.... N.... and*] this defendant, claiming title thereto adverse to the plaintiff and all other persons; and were, during all said time, used for the propulsion of a mill and other machinery, without hindrance or molestation from the persons owning or occupying the mill and premises alleged in the complaint to have been in the possession of the plaintiff.

1652. Justification of trespass by reason of defective fence.

I. That the plaintiff and defendant occupy farms contiguous to each other, and separated by a fence which the plaintiff was bound to keep in repair.

II. That the plaintiff, and all other tenants or occupants of the plaintiff's farm, which is the same premises mentioned in the complaint, from a time whereof the memory of man is not to the contrary, have repaired and ought to repair said fence; and the plaintiff, at and before the times mentioned in the complaint, ought to have repaired and maintained said fence so as to prevent the cattle of defendant on his farm from escaping on to the land of the plaintiff. [*Or where the obligation to maintain fence rests in agreement, it should be alleged accordingly.*]

III. That the plaintiff neglected to keep the fence in repair, by means whereof the cattle of the defendant escaped over the fence and on to the premises of the plaintiff; and thereby, and

without the fault of the defendant, was committed the supposed injury in the complaint alleged.

IV. That the defendant, as soon as he had notice of the escape of the cattle, entered upon the plaintiff's premises to, and did, drive them out, doing no unnecessary damage; which are the acts of which the plaintiff complains.

1653. Justification of rebuilding fence.

I. That the fence mentioned in the complaint was a part of the division-fence upon the line between the lands of the plaintiff and of the defendant, which, by a previous agreement between them, the defendant was bound to make, and keep in repair.

II. That he took up and removed the part of said fence which he was so bound to repair, and replaced the same with a new fence upon the said division line, and with as little injury as possible to the plaintiff's crops, as he had full right to do; which are the acts complained of.

1654. Justification of breaking plaintiff's house by virtue of search-warrant.

I. That at the time mentioned in the complaint, one M.... N...., being a justice of the peace of the town of in the county of, issued a warrant in writing under his hand and seal, directed to any constable of the said town, reciting, that whereas information on oath had been given to him, the said M.... N...., a justice of the peace as aforesaid, by one O.... P.... of that one hundred barrels of flour had lately been feloniously taken and carried away by Q.... R.... from the wharf, etc., of said O.... P...., and that the said one hundred barrels of flour, or a part thereof, were then concealed in a cellar of S.... T...., situate at; and the said justice did, in and by the said warrant, in the name of the people of this state, command and authorize them, the said constables, or any of them, with proper assistance, in the daytime, to enter into the cellar of the said S.... T...., situate at, and there diligently search for the said flour; and if the same, or any part thereof, should be found, then the said constables were, in and by the said warrant, likewise commanded to bring the same so found, together with the said S.... T...., or the person in whose custody the same should be found, before him, the said justice, or some other justice of the peace of said town, etc., to be dealt with as the law directs.

II. That said warrant was delivered to Y.... Z...., one of the defendants, then being one of the constables of the said

town, to be executed according to law, by virtue of which he went to the cellar of the said S.... T.... mentioned in the warrant, and which was part and parcel of, and belonging to, the dwelling-house mentioned in the complaint, and there finding the door thereof shut and fastened, did, in a friendly and peaceable manner, demand and require that the said door should be opened, which was then and there refused; and that thereupon the said Y.... Z...., one of the defendants, in order to execute the said warrant, did break open the said door, as it was lawful for him to do, doing as little damage as possible, and did search there for said flour, and took and carried away therefrom ninety-three barrels of flour, being part of the said one hundred barrels mentioned in the said warrant, and brought the same before the said justice, as he might lawfully do, which are the acts of which the plaintiff complains.

1655. Justification of trespass to retake property.

I. That on or about the day of, 19.., the plaintiff wrongfully took from the defendant's possession a horse [*or other property, describing the same*], which was then and still is the property of the defendant, and placed the same upon the plaintiff's said premises, and wrongfully refused to deliver the same to the defendant, though defendant frequently demanded the return thereof.

II. That thereupon this defendant entered upon the plaintiff's said premises, and retook said horse, and drove the same away, doing no unnecessary damage, which are the acts complained of in the plaintiff's said complaint.

1656. Justification on account of impassable highway.

I. That at the time alleged in the complaint there was a public highway adjoining plaintiff's said premises, which was then so miry and out of repair that it was impassable for vehicles and horses.

II. That the defendant at said time was lawfully attempting to pass over said highway with a vehicle and team of horses, and by reason of the said condition thereof was unable to do so, whereupon he took down a portion of plaintiff's fence and passed over a portion of defendant's premises around said foundrous portion of said highway, and returned to said highway as soon as he conveniently could, and did no unnecessary damage, which acts are the acts complained of by the plaintiff in his said complaint.

CHAPTER CXVII.

DEFENSES IN ACTIONS OF EJECTMENT.

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| <p>1657. Specific denial of title.</p> <p>1658. Title in one defendant, the others being in possession under it.</p> <p>1659. Equitable counter-claim for specific performance.</p> <p>1660. That the land which plaintiff seeks to recover was sold by him to defendant, and by mistake not conveyed in the deed.</p> <p>1661. Adverse possession, avoiding deed.</p> <p>1662. Adverse possession by de-</p> | <p>fendant and his grantor, under ten year statute.</p> <p>1663. The same, claiming under a judgment.</p> <p>1664. The same, where part only has been occupied.</p> <p>1665. Adverse possession under twenty year statute.</p> <p>1666. Answer with counter-claim for improvements.</p> <p>1667. Defense of special statute of limitations by original owner against tax title claimant.</p> |
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In ejectment the plaintiff must recover, if at all, on the strength of his own title, and under a general denial the defendant may prove any fact showing that plaintiff is not the owner, or is not entitled to the possession of the premises, except where defendant has ousted the plaintiff from actual and peaceable possession of the premises. If defendant depends on estoppel or an equitable title, it must be pleaded affirmatively.

1657. Specific denial of title.¹

The defendant denies that the plaintiff at the time of the commencement of this action was the owner or entitled to the possession of the premises described in the complaint.

1658. Title in one defendant, the other being in possession under it.

I. That before the commencement of this action, that is to say, on the day of, 19.., the said defendant E.... F.... became and was lawfully seized in fee of, all and singular, the lands and premises in the said complaint described, with the appurtenances, and entitled unto and possessed of the same, in

¹ This form may be used where title is alleged generally in the complaint; if the complaint set forth the chain of plaintiff's title

the answer should specifically deny the particular allegation in the chain which is attacked.

his sole and absolute right; and from thence, at all times, down to the time of the commencement of this action, have continued to be, and still continue to be, so seized in fee of every part and parcel thereof, and entitled unto and possessed of the same in their own sole and absolute right, and that the said other defendants [*naming them*], were, at the time of the commencement of this action, and still are, in the occupation of the said lands and premises, or of some part or parts thereof, under the said right, title, and possession of the said defendant E.... F....

II. Except as above admitted, the defendant denies each and every allegation in said complaint contained.

1659. Equitable counter-claim for specific performance.

I. [*Specific denial as in first form in this Chapter.*]

Second. By way of counter-claim, defendant alleges:

II. That on the day of, 19.., the plaintiff was the owner of said premises, and now has the legal title thereto; but on that day the plaintiff, by a contract in writing, of which a copy is annexed as a part of this answer, marked Exhibit A, sold, and agreed to convey, the same to the defendant on the terms therein specified, and put the defendant in possession thereof as purchaser.

III. That the defendant duly performed all the conditions thereof on his part, and on the day of, 19.., tendered to the plaintiff the sum of dollars, being the full sum then due the plaintiff upon said contract, with interest, but plaintiff then refused to receive the same.

IV. That defendant has ever since remained and still is ready and willing to pay plaintiff said sum, but the plaintiff has at all times refused to receive the same; and this defendant now brings the said sum of dollars into this court to be paid to the said plaintiff, if he will receive the same.

WHEREFORE [*demand for judgment as in action for specific performance.*]

1660. That the land which plaintiff seeks to recover was sold by him to defendant, and by mistake not conveyed in the deed.

I. [*Specific denial as in Form 1657.*]

Second. And by way of counter-claim the defendant alleges:

II. That on the day of, 19.., the plaintiff sold to defendant, and agreed to convey to him, the following described premises [*description of premises actually sold, including the premises demanded*].

III. That the defendant fully performed all the conditions thereof on his part, and the plaintiff executed and delivered to him a deed as and for a conveyance thereof, but which, by mistake in drawing the same, which mistake was then unknown to the parties to said deed, conveyed only the following described premises [*description*].

IV. That the defendant, supposing and believing said deed to be pursuant to the contract, and without negligence on his part, accepted it and took possession of the premises which he had agreed for, and still retains possession thereof.

V. That the premises mentioned in the complaint are a part of the premises designated in the contract, and the same which by said mistake was omitted to be included in said deed.

VI. That immediately upon discovering said mistake, to-wit, on or about the day of, 19.., the defendant applied to the plaintiff to correct the same by conveying said omitted part, which he refused to do.

WHEREFORE, the defendant asks judgment that the said deed be reformed by correcting said mistake in the boundaries, so that said deed shall express the true intent and meaning of the parties, and shall constitute a good and valid conveyance of the entire premises covered by said contract; that the said defendant be adjudged the true owner of the said premises described in the complaint, and that the title thereof be passed to and vested in this defendant, and for such other and further relief as may be just and equitable and for the costs and disbursements of this action.

1661. Adverse possession, avoiding deed.

I. That at the time of the delivery of the deed alleged in the complaint [*or the deed under which the plaintiff claims*] the lands therein described were in the actual possession of one M.... N...., claiming under a title adverse to that of the grantor in said deed.

1662. Adverse possession by defendant and his grantor, under ten year statute (Wis. Stats. 1898 secs. 4211-4215).

I. [*Denial as in first form in this Chapter.*]

And for a second and separate defense to this action, the defendant alleges:

II. That on the day of, 19.., one E.... F.... entered into possession of said premises described in the plaintiff's complaint, under claim of title, and exclusive of every and any other right, founding such claim upon * a written instrument, as being a conveyance of said premises, to-wit [a deed executed by G.... H.... to him] on the day of,

19.., duly witnessed and acknowledged, whereby the said G.... H.... granted and conveyed in fee simple to the said E.... F.... his heirs and assigns forever, the said premises, said deed containing the usual full covenants, which said deed was duly recorded in the office of the register of deeds for county, on the day of, 19.., at o'clock in the noon, on page of volume of the record of deeds, and that thereafter and on the day of, 19.., said E.... F.... by deed duly conveyed said premises to this defendant.

III. That ever since said entry by the said E.... F...., and for more than ten years immediately preceding the commencement of this action, this defendant, as the purchaser and grantee of said premises from said E.... F...., and the said E.... F.... before him, have been in the actual, continued occupation and possession of said premises, adverse to, and exclusive of, every other right, under claim of title founded upon said deed to the said E.... F.... above described.

IV. That during the whole of said time, since said entry, the said premises [and the whole thereof] have been usually cultivated and improved [and have been protected by a substantial enclosure] [*or such other allegations as show a possession and occupation under the proper statute*].

1663. The same, claiming under a judgment.

I. [*Same as in last preceding form.*]

II. [*Same as in last preceding form to the * after which substitute as follows*]: a decree or judgment of the court of county, in an action wherein L.... M.... was plaintiff and N.... O.... was defendant, which judgment was duly rendered on the day of, 19.., and on said last-named day duly entered in the office of the clerk of said court, and by which judgment it was determined and adjudged [*here state the relief granted respecting the land in question*].

III and IV. [*Same as in last preceding form, but inserting the word "judgment," instead of "deed."*]

1664. The same, where part only has been occupied.

I and II. [*Same as in either of two preceding forms alleging, however, the entry in allegation II to have been upon a part of said premises, only.*]

III. That ever since said entry by the said E.... F.... and for more than ten years immediately preceding the commencement of this action, this defendant as the purchaser and grantee of said premises from the said E.... F...., and the said E.... F.... before him, have been in the actual, con-

tinued occupation and possession of a part of said premises adverse to and exclusive of every other right under claim of title founded upon said deed [or judgment] to the said E.... F...., above described, and that the part of said premises so adversely occupied is described as follows [*insert description*].

IV. [*Same is in last preceding forms.*]

1665. Adverse possession under twenty year statute (Wis. Stats. 1898 secs. 4207-4212, 4213).

I. [*Denial as in first form in this chapter.*]

II. And for a second and separate defense, the defendant alleges that neither the plaintiff above named, nor his ancestor, nor predecessor, nor grantor, was seized or possessed of the said premises described in said complaint, nor any part thereof, within twenty years before the commencement of this action.

III. That the defendant [his ancestors, predecessors, and grantors] have held the said premises and been in the actual continued occupation and possession thereof, and of the whole thereof, exclusive of every and any other right, for more than twenty years, immediately preceding the commencement of this action.

IV. That during the twenty years last before the commencement of this action, said premises and the whole thereof, have been protected by a substantial enclosure, and have been usually cultivated and improved [*or such other allegations of possession as are made necessary by the proper statute*].

1666. Answer with counter-claim for improvements (Wis. Stats. 1898 secs. 3906, 3907).²

I. [*Denial as in first form in this chapter.*]

II. [*Affirmative defense if any, as in preceding forms.*]

By way of counter-claim herein, the defendant alleges:

III. That he has been in possession of the premises, described in the complaint, since the day of, 19.., holding adversely to said plaintiff by title founded upon a written instrument, to-wit [*here describe the deed or instrument fully according to its legal effect*].

²In Minnesota this defense should also state that defendant gave a valuable consideration for the land and the amount of such consideration, if defendant's claim be under an official deed, as well as the facts that such deed is regular on its face, and that defendant had no actual notice of any

defects invalidating the same. Minn. Rev. Laws 1905 sec. 4434 *et seq.* In North and South Dakota an allegation should be added stating the value of the land aside from the improvements thereon. N. Dak. Rev. Codes secs. 5910, 5911; S. Dak. Rev. Codes C. P. secs. 681, 682.

IV. That under said deed the defendant entered into exclusive possession of said premises, adversely asserting title thereto in good faith, founded upon said deed, and in the full belief that the said deed conveyed to him a good title; and still continues so to hold and possess said premises, claiming title thereto in good faith under said deed, and not otherwise.

V. That the defendant, while so in possession of said premises, holding adversely and asserting title in good faith, founded upon said deed, has made permanent and valuable improvements thereon, to-wit [*here state particularly improvements made*], said improvements are of the value of dollars.

VI. That during the time last aforesaid the defendant has paid the taxes assessed in said premises for the years 19.. and 19.., and that the amounts so paid, and the dates of payment are as follows [*state amounts and dates*].

WHEREFORE defendant demands judgment that the complaint herein be dismissed with costs, or that if plaintiff be adjudged entitled to recover possession of said premises that the defendant's said claim for improvements and taxes paid be tried, and that he recover the same, as provided by law, and for such other judgment as may be just and equitable.

1667. Defense of special statute of limitations by original owner against tax title claimant (Wis. Stats. 1898 sec. 1187).

I. [*Denial as in first form in this chapter.*]

And for a second and separate defense the defendant alleges:

II. That the plaintiff claims title and right of possession of said premises under a certain pretended tax deed, by which said premises were pretended to be conveyed to him by the county of for the non-payment of taxes thereon, which deed bears date, and was in fact executed on the day of, 19.., and recorded in the office of the register of deeds of said county of on the day of, 19.., more than three years before the commencement of this action.

III. That the said plaintiff has not been in the actual possession of said premises described in the complaint, nor any part thereof, for three successive years during the five years next after the recording of such deed.

IV. That the defendant has been the owner of said premises ever since and for a long time prior to the execution of said deed under which the plaintiff claims, and he, the defendant, has been during all of such time in the [actual and] continued possession of said premises as such owner.

CHAPTER CXVIII.

DEFENSES IN ACTIONS AGAINST OFFICERS OR STOCKHOLDERS OF CORPORATIONS.

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| 1668. Denial that defendant was an officer or stockholder of corporation. | 1669. Denial of recovery of judgment against corporation. |
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1668. Denial that defendant was an officer or stockholder of corporation.

The defendant denies that at the times named in the complaint, or at any time since the day of, 19.., he was a director [*or stockholder*] in the [*name corporation*], or has in any way managed or taken part in the management of the affairs of said corporation.

1669. Denial of recovery of judgment against corporation.

The defendant alleges that he has no knowledge or information sufficient to form a belief that the plaintiff recovered against the company the judgment mentioned in the complaint; or that there existed any indebtedness of said company to said plaintiff for the amount of said alleged judgment, or any part thereof, or that an execution was issued on said judgment, or was returned unsatisfied, or that said judgment, or any part thereof, remains unsatisfied.

CHAPTER CXIX.

DEFENSES IN ACTIONS OF DIVORCE.

1670. General denial.

1671. Denial of adultery.

1672. Condonation.

1673. Counter-claim for divorce
for plaintiff's adultery.

1670. General denial.

The defendant admits the marriage alleged in the complaint, and denies each and every other allegation of said complaint.

1671. Denial of adultery.

The defendant denies that at the time named in the complaint, or at any other time, he committed adultery with the person named in said complaint [*or persons named in said complaint, or with either of them, or with any other person*].

1672. Condonation.

I. The defendant alleges that after the times mentioned in the complaint, and before this action, the plaintiff being informed as to the matters therein alleged, freely condoned said alleged adultery, and forgave the defendant therefor [*and freely cohabited with him*].

II. That ever since such condonation the defendant has been a faithful husband to the plaintiff, and has constantly treated her with conjugal kindness.

1673. Counter-claim for divorce for plaintiff's adultery.

Second. For a second defense and a counter-claim the defendant alleges [*proceeding as in forms given in Chapter LXXVIII*].

WHEREFORE, the defendant demands judgment [*etc., as in said forms*].

CHAPTER CXX.

DEFENSES IN VARIOUS EQUITABLE ACTIONS.

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| <p>1674. Denial of execution in creditors' action.</p> <p>1675. Denial of residence in creditors' action.</p> <p>1676. That defendant has assets in creditors' action.</p> <p>1677. Denial of possession of assets belonging to judgment-debtor in creditors' action.</p> <p>1678. Denial that conveyance was fraudulent in creditors' action.</p> <p>1679. Denial of errors in account stated.</p> <p>1680. Denial of payment or tender in action for specific performance.</p> <p>1681. Denial of readiness to convey in action for specific performance.</p> <p>1682. Denial of title in action for specific performance.</p> <p>1683. Denial of mortgage, in mortgage foreclosure.</p> <p>1684. Extension of time of payment, in mortgage foreclosure.</p> <p>1685. Denial of having assumed</p> | <p>mortgage in mortgage foreclosure.</p> <p>1686. That defendant, having an equity of redemption in a part of the premises, is entitled to have the residue sold first, in mortgage foreclosure.</p> <p>1687. Non-joinder of owner of equity of redemption, in mortgage foreclosure.</p> <p>1688. Ratification by infant after coming of age.</p> <p>1689. General answer of infant or lunatic, in foreclosure, partition, etc.</p> <p>1690. By trustee, that he declines to act.</p> <p>1691. The same, with denial of having acted.</p> <p>1692. That defendant is a <i>bona fide</i> purchaser without notice of incumbrances.</p> <p>1693. Disclaimer.</p> <p>1694. That the term is not expired, in action to dissolve partnership.</p> <p>1695. Overdrawing done by plaintiff's assent, in action to dissolve partnership.</p> |
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1674. Denial of execution in creditors' action.

The defendant denies that any execution upon the said judgment was ever returned unsatisfied in whole or in part [*or* was ever issued to the said county] before this action.

1675. Denial of residence in creditors' action.

The defendant denies that he was, at the time mentioned in the complaint, a resident of the county to which execution is alleged to have been issued; and alleges that he was a resident of county, to which no execution was issued before this action.

1676. That defendant has assets in creditors' action.

The defendant alleges that the defendant [*the judgment-debtor*] has, and at the commencement of this action had, real property [*or personal property, or both*], in the county of in this state, liable to execution, and sufficient in value to satisfy said judgment, to-wit [*designating what*].

1677. Denial of possession of assets belonging to judgment-debtor in creditors' action.

The defendant denies that he had, at the commencement of this action, or had at any time since, property of the defendant [*debtor*] in his possession or under his control, as alleged.

1678. Denial that conveyance was fraudulent in creditors' action.

The defendant alleges that upon the making of the alleged assignment [*or mortgage*] there was an actual and continued change of the possession of the assigned [*or mortgaged*] property from the said [*debtor*] to the [*transferees*] who, immediately after the execution of the assignment [*or mortgage*] took actual and exclusive possession of the property; and that it has at all times since the assignment [*or mortgage*] remained in their exclusive possession and control.

1679. Denial of errors in account stated.

The defendant alleges that the account stated, which is mentioned in the complaint, is true and just [*except as to, here specifying any admitted error*] and that there are no errors or mistakes in the stating of the said account, as alleged [*except as aforesaid*].

1680. Denial of payment or tender in action for specific performance.

The defendant denies that the plaintiff, at the time named in said complaint or at any other time, paid or tendered to the defendant any part of [*or said second instalment of*] the said purchase-money agreed.

1681. Denial of readiness to convey in action for specific performance.

The defendant denies that the plaintiff was at any time ready and willing to convey the premises, as alleged; but [*here state refusal or inability, according to the fact, as it would be stated in an action for damages for the breach*].

1682. Denial of title in action for specific performance.

The defendant alleges that the plaintiff was not, and is not, owner in fee [*or otherwise, according to the complaint*] of the said premises, and could not, nor can he make to the defendant a good and sufficient title thereto, free and clear of incumbrances [*or otherwise, according to the complaint*]; but on the contrary [*setting forth incumbrances, if any*].

1683. Denial of mortgage, in mortgage foreclosure.

Defendant denies that he has knowledge or information sufficient to form a belief as to whether the defendant [*mortgagor*] ever executed the bond and mortgage described in the complaint, or whether the defendant [*mortgagee*] ever assigned said supposed bond and mortgage to the plaintiff, or whether he is now the lawful owner or holder thereof.

1684. Extension of time of payment, in mortgage foreclosure.

The defendant denies that any sum was due the plaintiff at the time of the commencement of this action or is now due upon the note and mortgage set forth in the complaint, and on the contrary thereof alleges that on the day of , 19. . , the said plaintiff, for a valuable consideration to him paid by the defendant, contracted and agreed with the defendant that the time for the payment of the principal sum named in said note should be extended from [*date*] until [*date of extension*] which said agreement of extension is still in force.

1685. Denial of having assumed mortgage in mortgage foreclosure.

I. The defendant denies that the defendant [*mortgagor*] ever executed or delivered any deed or conveyance of the premises described in the complaint to this defendant [except as hereinafter admitted, or that this defendant ever accepted said supposed deed, or entered into possession of said premises, or ever in any manner whatever assumed or agreed to pay the mortgage set forth in the complaint.

II. The defendant alleges that the defendant [*mortgagor*] being indebted to this defendant in about the sum of dollars executed at and procured to be recorded in the month of , 19. . , without the knowledge or assent of this defendant, a deed of the premises described in the complaint, which deed is recorded in book of conveyances, page , in the office of the of the county of That said deed never was delivered to this defendant, nor was any copy

thereof, nor was it ever accepted by him, nor did he ever execute it, or agree or consent to it in any manner whatsoever, nor did he ever, in any manner, by said deed or otherwise, agree or assume to pay the incumbrances on said property, or any of them, nor was he cognizant of the terms, or character, or contents of said deed, until the day of, 19..; and that he then rejected and refused to accept said deed.

III. Defendant further says, that said deed was executed by said [*mortgagor*] to this defendant, as he is informed by said [*mortgagor*] and believes, for the purpose of securing said indebtedness of said [*mortgagor*] to this defendant; that there was no consideration whatsoever for the insertion in said deed, of the clause providing that this defendant assumed and agreed to pay the incumbrances therein specified, or that he took subject thereto; that said clause was inserted by mistake; that immediately upon this defendant's being cognizant of said deed, and before the commencement of this action, being on the ... day of, 19.., he procured from the defendant [*mortgagor*] and the defendant [*mortgagor*] executed to this defendant, under his hand and seal, a release, whereby he discharged and released him from any assumption of said mortgage, which said release was duly recorded in book of Conveyances, page in the office of said on the day of, 19..

1686. That defendant, having an equity of redemption in a part of the premises, is entitled to have the residue sold first, in mortgage foreclosure.

I. That after the making of the mortgage mentioned in the complaint, and which the plaintiff seeks to foreclose, said [*mortgagor*] conveyed to this defendant a part of the mortgaged premises for a valuable consideration, by deed bearing date on the day of, 19.., and recorded on the day of, 19.., in book of Conveyances, page, in the office of the of the county of which said portion of the mortgaged premises are described as follows [*copy of description*].

II. [That after the aforesaid conveyance, the said [*mortgagor*] conveyed the residue of said premises to the defendant W.... X....]

WHEREFORE the defendant demands that if a foreclosure be adjudged, all of said premises not so conveyed to this defendant be sold first; and that the premises so conveyed to this defendant be not sold, unless a sale thereof should be necessary to satisfy deficiency arising after the sale of such residue.

1687. Non-joinder of owner of equity of redemption, in mortgage foreclosure.

I. That after the making of the mortgage in the complaint described, and before this action, the defendant X...., being seized of the premises, by his deed under his hand and seal, dated on the day of, 19.., duly conveyed the same to one M.... N...., subject to said mortgage.

II. That said M.... N.... is still living at, and is now the owner of the equity of redemption in said premises.

1688. Ratification by infant after coming of age.

I. That said [*infant*] after the making of said deed, attained the age of twenty-one years.

II. That thereupon [*or afterwards*], and on or about the day of, 19.., and before this action, he assented to, and ratified and confirmed the same, with full knowledge of the facts.

1689. General answer of infant or lunatic, in foreclosure, partition, etc.

This defendant, answering by his said guardian, says that he is a stranger to all and singular the matters and things in the complaint in this action set forth, and that he is an infant under the age of twenty-one years [*or, a lunatic duly adjudged to be such by on the day of, 19..*] and claims such interest in the premises as he is entitled to; and he submits his rights and interests in the matters in question in this action to the protection of the court.

1690. By trustee, that he declines to act.

Admits that he declines to act in the trusts of said settlement, and is desirous of being discharged therefrom. Defendant further says, that he is ready to convey and release said trust-premises to the plaintiff, and to such new trustee as may be appointed by the court, on being indemnified in that behalf, and paid all his costs and expenses.

1691. The same, with denial of having acted.

I. The defendant, admitting that said [*testator*] left the will described in the complaint, says that he absolutely refused to accept or intermeddle with said trust, or in any way concern himself therein.

II. He further says that he never entered on said trust-estate, or received any of the rents and profits thereof.

III. That M.... N...., who has received said rents and profits, had no power or authority from this defendant to do so, and never accounted to this defendant therefor.

IV. That this defendant is desirous and ready to be discharged from said trust, and to do any act the court shall direct for that purpose, he being indemnified and having his costs.

1692. That defendant is a bona fide purchaser without notice of incumbrances.

I. That on the day of, 19.., M.... N.... was, or pretended to be, the owner in fee-simple of the lands and premises described in the complaint, free from all incumbrances; and he then was in the actual possession thereof.

II. That the defendant, believing the said M.... N.... to be the owner of said premises, on that day agreed with him for the purchase thereof in fee-simple, for the price of dollars; whereupon the said M.... N.... conveyed the said premises to this defendant, by his deed, dated on the day of, 19.., which deed contained a covenant on the part of said M.... N.... that he was absolutely seized of said premises, and that the same were free from all incumbrances.

III. That said sum of dollars was actually paid by this defendant to said M.... N.... [at the time of the date of said deed].

IV. That this defendant had not, at or before the time of the said conveyance, or of the said payment of the purchase-money, any notice whatsoever, either express or implied, of the said mortgage now claimed by the plaintiff, or of any other incumbrance whatsoever that affected the said premises.

V. That at the time of said conveyance and payment the said mortgage had not been recorded in the office of the for the county of [*being the county wherein said lands are situated*], nor was the same recorded until the day of, 19.. [or, nor has the same ever been recorded in said office].

1693. Disclaimer.

The defendant alleges that he disclaims all right, title, and claim to any estate of inheritance or of freehold in the premises described.

1694. That the term is not expired, in action to dissolve partnership.

Denies that the partnership between him and the plaintiff set forth in the complaint, was upon the terms, and according

to the stipulations, agreements, and covenants alleged by plaintiff in his said complaint; but, on the contrary thereof, defendant alleges and states that said partnership was formed, and entered into, and carried on, under and in pursuance of a written agreement and articles of copartnership between him and said plaintiff; a copy of which is hereto annexed, and forms part of this answer, showing that the time for the continuance of said copartnership is yet unexpired, which agreement has never been altered or varied in writing or by parol; and that the copartnership formed and carried on in pursuance thereof, is the same set forth and alleged in said complaint.

1695. Overdrawing done by plaintiff's assent, in action to dissolve partnership.

Denies each and every allegation set forth in the [third separate cause of action in] said complaint, relative to the alleged misconduct of defendant, and his alleged acts and doings in the management of the said partnership business, except the allegation of his drawing out from the funds of said copartnership more than his portion of the profits thereof, to-wit, the sum of dollars—and investing the same in, etc., etc; and as to such allegation, defendant alleges and states that it was done with the full knowledge of said plaintiff, and with his approbation and express assent.

CHAPTER CXXI.

COUNTER-CLAIMS, FORMAL PARTS.

1696. General form.

1697. Defenses and counter-claims, pleaded together.

1696. General form.

The defendant [*naming him, if he is one of several, answering separately*], by M.... N...., his attorney, answering the complaint herein, for a counter-claim [to the first cause of action] alleges:

That on the day of, 19.., and before the commencement of this action, the plaintiff became, and still is, indebted to this defendant upon an account [*etc., or otherwise, stating cause of action as if in a complaint*].

WHEREFORE, etc. [*demand for judgment as in a complaint*].

1697. Defenses and counter-claims, pleaded together.

The defendant [*naming him, if he is one of several, answering separately*], by M.... N.... his attorney, answering the complaint herein:

First. For a first defense thereto alleges, etc.

Second. For a second defense, said defendant alleges, etc., etc.

Third. For a counter-claim thereto, said defendant alleges [*here set forth cause of action as in a complaint*].

Fourth. For a second counter-claim thereto, said defendant alleges, etc.

WHEREFORE, etc. [*demand for judgment as in a complaint*].

CHAPTER CXXII.

REPLIES; FORMAL PARTS.

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|--|---|---------------------------------------|
| 1698. General form (Wisconsin). | | replied to as well as counter-claims. |
| 1699. The same, interposing both denial and new matter in defense (Wisconsin). | | |
| 1700. Reply of statute of limitations (Wisconsin). | 1702. The same, where answer contains both denials and new matter. | |
| 1701. Reply in states where new defensive matter must be | 1703. The same, where answer contains both a defense and a counter-claim. | |

1698. General form (Wis. Stats. 1898 sec. 2661).

The plaintiff, replying to the counter-claim contained in the answer of the defendant [*or, the first, or other counter-claim contained in the answer of the defendant*], alleges [*or denies, etc., continuing as in an answer to a complaint*].

1699. The same; interposing both denial and new matter in defense (Wisconsin).

The plaintiff, replying to the answer of the defendant W.... X.... herein, as to the [first] counter-claim,

First. Denies each and every allegation of the answer respecting the same.

Second. For a second defense to said counter-claim the plaintiff alleges:

That at the time alleged in the complaint as the time of the making of the supposed note therein mentioned, this plaintiff was an infant under the age of twenty-one years, to-wit, of the age of years [*or stating other defense, as if in an answer to a complaint*].

1700. Reply of statute of limitations (Wisconsin).

The plaintiff alleges that the said cause of action, alleged for a counter-claim in said answer, did not accrue at any time within years next before the commencement of this action.

1701. Reply in states where new defensive matter must be replied to as well as counter-claims.¹

The plaintiff, replying to the defendant's answer herein, denies each and every allegation therein contained.

[The foregoing is to be used where the answer contains defensive matter only.]

1702. The same, where answer contains both denials and new matter.

The plaintiff, replying to the defendant's answer [*or to the first defense contained in the defendant's answer*] herein, denies each and every allegation contained in the second paragraph of said answer [*or defense, or otherwise clearly specify the part of the answer containing new matter*] and alleges [*set forth new matter in avoidance, as in an answer*].

1703. The same, where answer contains both a defense and a counter-claim.

The plaintiff, replying to the defendant's answer [*or, to the first defense stated in the defendant's answer*] herein,

I. Denies [*specify new matter in answer which is denied*].

II. Alleges that [*set forth new matter in avoidance as in an answer*].

As to the [first] counter-claim in said answer contained, the plaintiff, for a first defense,

I. Denies each and every allegation thereof [*or plead specific denial of particular facts*].

II. For a second defense to said counter-claim, alleges that [*here state new facts, as in an answer*].

¹ In Minnesota, Iowa, and Nebraska new matter set up in the answer, as well as a counter-claim, is required to be met by a reply. Minn. Rev. Laws 1905 sec. 4134; Iowa Code secs. 3576, 3577; Cobbe's Ann. Stats. of Nebr. sec. 1111. In North and South Da-

kota, defensive matter in the answer is not required to be replied to, unless the court orders a reply to new matter in the answer, constituting a defense by way of avoidance. N. Dak. Rev. Codes sec. 5277; S. Dak. Rev. Codes C. P. sec. 130.

PART IV

FORMS OF SUPPLEMENTAL PLEADINGS

1055

CHAPTER CXXIII.

SUPPLEMENTAL PLEADINGS.

1704. General form of supplemental pleading.

1705. Supplemental complaint in a creditor's suit, seeking to set aside an assignment made subsequent to the original complaint, which alleged that defendants intended to assign with preferences, in violation of an agreement with the plaintiffs, and prayed an injunction.

The codes generally provide that either party may be allowed, on terms, to make and serve a supplemental pleading alleging material facts occurring after the former pleading, or of which the party was ignorant when the former pleading was made. Wis. Stats. 1898 sec. 2687; Iowa Code sec. 3641; N. Dak. Rev. Codes sec. 5301; S. Dak. Rev. Codes C. P. sec. 154. In Minnesota and Nebraska the right is confined to statement of facts occurring after the making of the original pleading. Minn. Rev. Laws 1905 sec. 4137; Cobbey's Ann. Stats. of Nebr. sec. 1149. The supplemental pleading does not take the place of the former pleading, nor set up a distinct cause of action; it simply alleges certain additional facts germane to the original cause of action or defense.

1704. General form of supplemental pleading.

[*Title.*]

The plaintiff [*or defendant*] for a supplemental complaint [*or answer*] herein, pursuant to an order of this court, dated, 19. . ., alleges, etc.

[*Or, when the proposed supplemental complaint is served with the motion for leave*]:

The plaintiff [*or defendant*] for a proposed supplemental complaint [*or answer*] herein, alleges, etc., etc.

1705. Supplemental complaint in a creditor's suit, seeking to set aside an assignment made subsequent to the original complaint, which alleged that defendants intended to assign with preferences, in violation of an agreement with the plaintiffs, and prayed an injunction.

[*Title of the cause, naming among the defendants the assignees now joined as parties*].

The plaintiffs, for a supplemental complaint herein [pursuant to an order of this court, dated, 19..] and on behalf of

themselves, and all the other creditors of M.... N.... & Co., entitled under the original complaint to come in, and who may come in and contribute to the expenses of this suit, complain and allege:

I. That on the day of, 19.., they commenced their action in this court against the defendants [*naming the debtors*] by the service of a summons and copy of complaint, to which complaint the plaintiffs refer as if the same were herein repeated, and as part of this supplemental complaint.

II. That an injunction was granted, pursuant to the said complaint, restraining the said defendants from making any assignment or disposition of the property owned by the firm of M.... N.... & Co., in the month of, 19.., or the proceeds thereof. That at the time of service of the said summons and complaint, the said injunction was duly served on all the said defendants.

III. That after the service of the said injunction, the said defendants, in violation thereof, executed an assignment to the present defendants [*naming assignees*] of all the property of the firm of M.... N.... & Co., including a large amount of property owned by the said firm in the month of, 19.., and a large amount of the proceeds of other property, also belonging to the said firm in the said month.

IV. That, as the plaintiffs are informed and believe, the said [*assignees*] had notice of this action and of the said injunction at the time of the execution and delivery of the said assignment.

V. That, as the plaintiffs are informed and believe, the said assignment was upon some trust for the payment of creditors of the said firm, with certain preferences to a large amount to a part of their creditors, not including the plaintiffs, and in violation of the agreement alleged in the said original complaint; and the property thus assigned is not sufficient to pay the debts which the said firm owed in said month of last, and still remaining unpaid.

VI. That the said [*debtors*] have recently, in the most public manner, stated that they owed, at the time of their failure in last, three millions of dollars, two millions of which they claim to have satisfied; they also as openly state their losses in disposing of a portion of their stock of goods, and their store expenses, and expenses in making collections, at six hundred thousand dollars since their failure in last, and the plaintiffs believe and insist that there has been an unwarrantable sacrifice of their best assets.

VII. That, as the plaintiffs are informed and believe, the said firm, and all the members thereof, were, in last, when they obtained the extension mentioned in the original complaint, and have ever since been, largely insolvent.

VIII. That it was a condition of the said extension that all the creditors of the said firm should come into it, and the extension given by the plaintiffs was upon that condition; but in fact only about one-third of the creditors did come into it, and this fact was concealed from the plaintiffs; they received the extended notes on the faith of the extension having been agreed to by all the creditors.

IX. That if the said assignment is carried into effect, the plaintiffs will receive as their dividend not more than fifty per cent. of their demands, as they are informed and believe. The said [*assignees*] are not of sufficient pecuniary responsibility or business experience to be intrusted with so large an amount of property; the said O.... P.... was formerly a clerk of the said M.... N.... & Co., and the said Q.... N.... is a son of M.... N.... and, as the plaintiffs believe, will be entirely under the control and direction of said M.... N...., and the said assignment is merely a cover to enable the said M.... N.... to keep the property in his own possession.

WHEREFORE, the plaintiffs demand judgment as in the original complaint demanded, and that the said garnishment be set aside, that the property assigned be delivered to a receiver, and distributed equally among all the creditors of M.... N.... & Co. who were such in last; and that in the mean time the defendants be restrained by injunction from disposing of any of the said assigned property.

CHAPTER CXXIV.

PROCEEDINGS TO COMPEL SERVICE OF ACCOUNTS AND BILLS OF PARTICULARS.

- | | |
|--|--|
| 1706. Demand for copy of account. | 1712. Affidavit to obtain further bill of particulars. |
| 1707. Affidavit for extension of time to plead, pending delivery of copy of account. | 1713. Order for further bill of particulars. |
| 1708. Order extending time to plead, pending service of copy of account. | 1714. Copy of account or bill of particulars to be furnished. |
| 1709. Demand for copy of bill of particulars. | 1715. Notice of motion to preclude party from giving evidence of account or bill of particulars. |
| 1710. Affidavit by defendant on which to base motion for bill of particulars. | 1716. Order precluding plaintiff from giving evidence on trial. |
| 1711. Order to furnish bill of particulars. | |

In actions brought to recover upon accounts for goods sold or labor performed, the defendant may demand that a copy of the account be served upon him if it be not incorporated in or attached to the complaint. Wis. Stats. 1898 sec. 2672; Minn. Rev. Laws 1905 sec. 4151; N. Dak. Rev. Codes sec. 5282; S. Dak. Rev. Codes C. P. sec. 135. In Iowa and Nebraska the statutes require the account to be attached to the complaint, and if it be not attached the complaint is demurrable in Iowa, and subject to motion to compel the plaintiff to attach a copy to the complaint in Nebraska. Iowa Code secs. 3623, 3561; Cobbey's Ann. Stats. of Nebr. sec. 1124; Bank v. Engelbrecht, 58 Nebr. 639 s.c. 79 N. W. 556.

The sections above cited from the Statutes of Wisconsin, North Dakota, and South Dakota, are substantially identical, and provide further that "the court may in all cases order a bill of particulars of the claims of either party to be furnished," and by Rule XVI C. C. Rules Wis., the court may also grant such modification of the time for service of answer, demurrer or reply as the granting of the order may render necessary. The Minnesota Statute does not contain the general clause just noted in Wisconsin, North Dakota and South Dakota, and it is held in that state that a bill of particulars may only be demanded in an action on account, and that in other actions

the remedy is by motion to make the complaint more definite and certain. *Comm'rs. v. Am. Loan & T. Co.*, 75 Minn. 489 s.c. 78 N. W. 113.

With slight alterations the forms in this Chapter may be readily adapted for use by the plaintiff in case he be entitled to demand a copy of the account or bill of particulars upon which defendant's counter-claim is based.

1706. Demand for copy of account.

[*Title.*]

SIR: You are hereby required to deliver to me, within ten days after service hereof on you, a copy [*or, if complaint be verified, a verified copy*] of the account alleged in the complaint in this action.

Dated, 19..

G.... H....
Defendant's Attorney.

To E.... F....,
Attorney for Plaintiff.

1707. Affidavit for extension of time to plead, pending delivery of copy of account.

[*Title.*]

[*Venue.*]

G.... H...., being first duly sworn, says that he is the attorney for the defendant in this action; that the same was commenced by the service of a summons and complaint, on the day of, 19.., and is brought to recover the sum of dollars alleged to be due from the defendant to the plaintiff upon account for goods sold [*or otherwise state what action is brought for*]; that the items of said alleged account are not set forth in said complaint, and on the day of, 19.., this affiant served a written demand on the plaintiff's attorney, of which demand a copy is hereto annexed and made part hereof; that said account has not yet been served on this affiant; that the time for answering the said complaint expires on the day of, 19.., and that the affiant is unable to prepare the answer to said complaint without said account; that the defendant has instructed this affiant to prepare an answer, and has expressed to affiant a purpose in good faith to defend the action, and from a statement of the case in this action made by the defendant to him, the affiant verily believes that the defendant has a good and substantial defense upon the

merits to the cause of action set forth in the complaint, or to some part thereof.

G.... H....

[*Jurat.*]

1708. Order extending time to plead, pending service of copy of account.

[*Title.*]

On reading and filing the affidavit of L.... M.... hereto annexed, and the complaint in this action, and on motion of G.... H...., attorney for the defendant,

ORDERED that the time for answering the complaint herein be extended for days after the plaintiff shall have delivered to the defendant's attorney a copy of the account referred to in said complaint.

And meanwhile let all proceedings herein, on the part of the plaintiff, be stayed.

Dated, 19..

J.... K....

Circuit Judge.

[*Or other proper officer.*]

1709. Demand for copy of bill of particulars.

[*Title.*]

SIR: You are hereby required to serve upon me within ten days a bill of particulars of the plaintiff's claim in this action, showing the names and amounts of the various articles of merchandise alleged to have been sold by the plaintiff to the defendant, with dates and prices thereof, and all payments or credits upon the same. [*Or, the various items of damage which the plaintiff claims to have sustained by reason of the alleged wrongful acts of the defendant; or, the amount, nature and kind of services which the plaintiff claims, and the value of the same by items, with the date when each item was rendered; or, the various breaches of the bond named in the complaint; or, the particular goods or property claimed to have been converted by the defendant, by items, with the date of the alleged conversion of each item and the value thereof; or, the particular sales which the plaintiff lost by reason of the defendant's alleged libelous statement, and the profits lost on each sale, with the names of the persons whose custom is alleged to have been lost, and the times when and places where such loss occurred.*]

Dated, 19..

G.... H....

To E.... F.... Esq.,
Plaintiff's Attorney.

1710. Affidavit by defendant on which to base motion for bill of particulars.[*Title.*][*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action.

That the complaint herein was served on the day of, 19..

That the cause of action therein stated is for [*here state what*] and is alleged in general terms, and fails to state the particulars of the plaintiff's claim.

That the defendant, on the day of, 19.., made demand in writing on the plaintiff that he deliver a bill of particulars of his claim; a copy of which demand is attached hereto and marked "Exhibit A;" that notwithstanding such demand no bill of particulars has been served on or furnished to the defendant.

That the defendant's purpose is to defend this action in good faith, and he is ignorant of the particulars of the plaintiff's claim.

That he has a valid defense to the whole of the plaintiff's said cause of action [*or, to a part of the said plaintiff's cause of action, specifying what part*]; that he has fully and fairly stated the case in this action to his counsel G.... H.... Esq., who resides at and that upon the statement thus made he is advised by his counsel that he has a valid and substantial defense to said action in whole [*or, in part as aforesaid*].

That it is necessary and material to his said defense that a bill of particulars of the plaintiff's said claim be rendered, as he is advised by his said counsel after such statement so made, and as he verily believes.

That no previous motion for service of such bill of particulars has been made, and that the time for answering said complaint will expire, 19.., and has not been extended.

That this affidavit is made for the purpose of moving for an order requiring the service of such bill of particulars, and for an extension of time in which to answer said complaint, with a stay of proceedings during such time.

C.... D....

[*Jurat.*]**1711. Order to furnish bill of particulars.**[*Title.*]

The defendant's motion for a bill of particulars of the plaintiff's claim coming on to be heard on the day of,

19.., and on reading the complaint, the affidavit of the [*defendant*] and [*here mention other papers used on hearing*], G.... H.... attorney for defendant, appearing for the motion, and E.... F.... for the plaintiff opposing, and after hearing and being advised in the premises,

ORDERED that within days after the service of this order on his attorney, the plaintiff deliver to the defendant's attorney a bill of particulars [duly verified], of the demand for which this action is brought, stating fully [*here specify what the bill shall specially state*], and—

That all proceedings herein, on the part of the plaintiff, be stayed, and that the defendant have days, after the service of such bill, in which to answer the complaint, and that he recover ten dollars, the costs of this motion.

Dated, 19..

J.... K....
Judge.

1712. Affidavit to obtain further bill of particulars.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action, and that on the day of, 19.., the plaintiff, upon defendant's demand [*or, upon an order so requiring*] served on the defendant's attorney herein a copy of the account mentioned in his complaint [*or, a bill of particulars of the plaintiff's demand on which this action is brought*] which copy so served is hereto annexed.

That the same is so defective, indefinite and insufficient that the defendant is unable to answer the same [*or, to go to trial thereon*], in that it fails to state the dates of the several items of the account [*or otherwise specify the defects*] and that a further and more specific account [*or bill of particulars*] is absolutely necessary in order to enable the defendant to prepare his answer and prepare for trial for the following reasons [*here state reasons*].

C.... D....

[*Jurat.*]

1713. Order for further bill of particulars.

[*Title.*]

Upon the affidavit of C.... D...., and upon the complaint herein and upon [*name other papers if any, on which order is based*], and upon motion of G.... H...., Esq., defendant's

attorney, E.... F...., Esq., plaintiff's attorney having appeared in opposition thereto,

ORDERED that the plaintiff's attorney deliver to the defendant's attorney, within days after service of this order, a further account in writing, of the particulars of the plaintiff's demand herein, specifying [*here point out particularly the defects to be supplied*].

Ordered further [*continue with order for stay, etc., as in last preceding order.*]

1714. Copy of account or bill of particulars to be furnished.
[*Title.*]

To G.... H...., Esq.,
Defendant's Attorney.

TAKE NOTICE that the within is a true copy of the account mentioned in the complaint herein [*or, a true bill of particulars of the plaintiff's demand in this action*] as demanded by you.

Dated, 19..

E.... F....,
Plaintiff's Attorney.

[*If complaint be verified, attach verification to the account or bill, as follows*]:

[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in the above entitled action, and that the foregoing is a correct account [*or, bill of particulars*] of the plaintiff's claim on which this action is brought, and that he verily believes it to be true.

A.... B....

[*Jurat.*]

1715. Notice of motion to preclude party from giving evidence of account or bill of particulars.

[*Title.*]

SIR: Please take notice that upon the complaint herein and the account and further account [*or, bill of particulars and further bill of particulars*] heretofore served herein, and upon the affidavit of L.... M...., a copy of which is hereto annexed and herewith served on you, the defendant, by his counsel, will move the court, at the next regular term thereof, at the court house in the of, in said county, at the opening of the court on the day of, 19.., or as soon thereafter as counsel can be heard, for an order herein that the plaintiff be precluded from giving evidence on the trial of this action,

of the matters of which he has failed and refused to furnish a sufficient bill of particulars [*or, account*] to-wit [*here specify the matters sought to be precluded*], and for such other order or relief as the court may grant in the premises.

Dated, 19..

G.... H....,
Defendant's Attorney.

To E.... F.... Esq.,
Plaintiff's Attorney.

1716. Order precluding plaintiff from giving evidence on trial.
[*Title.*]

The motion of the defendant for an order precluding the plaintiff from giving evidence of certain matters therein specified, coming on to be heard at said term on the day of, 19..;

On reading and filing the affidavit of L.... M.... herein, and on the pleadings and [*here state other papers used in the motion*], and after hearing G.... H...., attorney for the [*defendant*] for the motion, and E.... F...., plaintiff's attorney in opposition, and being advised in the premises:

ORDERED that, upon the trial of this action, the plaintiff be precluded from giving evidence of, or in support of, the matters of which he has failed to furnish a [*further*] sufficient account [*or, bill of particulars*] as required herein, to-wit [*here specify the matters precluded*], and that the plaintiff have ten dollars, the costs of this motion.

By the Court:

L.... M...., Circuit Judge.

CHAPTER CXXV.

MOTIONS RESPECTING THE PLEADINGS.

- | | |
|---|--|
| <p>1717. Notice of motion for extension of time to answer.</p> <p>1718. Affidavit for extension of time to answer.</p> <p>1719. Order extending time to plead.</p> <p>1720. Notice of motion to make pleading more definite and certain.</p> <p>1721. Order thereon.</p> <p>1722. Notice of motion for leave to serve amended pleading, copy served with motion.</p> <p>1723. Notice of motion for leave to amend, amended pleading not served.</p> <p>1724. Order allowing amended pleading.</p> <p>1725. Notice of amended pleading, when copy has not been served with the motion.</p> <p>1726. Order giving leave to amend formal error.</p> <p>1727. Notice of motion to amend complaint by striking out co-plaintiffs, and making them defendants.</p> <p>1728. The same, by adding defendant.</p> <p>1729. The same, by correcting fictitious name.</p> <p>1730. Affidavit to obtain leave to correct fictitious name.</p> <p>1731. Order thereon.</p> <p>1732. Affidavit for leave to file supplemental complaint.</p> <p>1733. The same, copy of supplemental pleading served with motion.</p> <p>1734. Notice of motion for leave to file supplemental complaint.</p> <p>1735. Order allowing supplemental complaint.</p> | <p>1736. Affidavit on application to file supplemental answer.</p> <p>1737. Order granting leave to make supplemental answer.</p> <p>1738. Notice of motion to compel reply.</p> <p>1739. Order thereon.</p> <p>1740. Affidavit on motion to dismiss for failure to file complaint and pay state tax (Wisconsin).</p> <p>1741. Certificate that summons is not filed, nor tax paid (Wisconsin).</p> <p>1742. Order thereon (Wisconsin).</p> <p>1743. Notice indorsed on pleading returned for irregularity.</p> <p>1744. Notice of irregularity in respect to one of several persons pleading together.</p> <p>1745. Notice of motion to require attorney to receive pleading.</p> <p>1746. Order thereon.</p> <p>1747. Notice of motion to strike out irrelevant, redundant or scandalous matter.</p> <p>1748. Order thereon.</p> <p>1749. Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.</p> <p>1750. Affidavit for same.</p> <p>1751. Order requiring election.</p> <p>1752. Notice of motion to strike out answer.</p> <p>1753. Affidavit to falsify of answer.</p> <p>1754. Corroborative affidavit.</p> <p>1755. Order thereon.</p> <p>1756. Notice of motion to strike out one defense as sham, and for judgment upon the other as frivolous.</p> |
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|--|--|
| 1757. Notice of motion for judgment on frivolous pleading (Wisconsin).
1758. Order striking out and answer in part as frivolous and in part as irrelevant (Wisconsin).
1759. Order for judgment on frivolous pleading.
1760. The same, reserving leave to amend.
1761. Notice of motion by plaintiff | iff for judgment on the pleadings.
1762. Notice of application for judgment for amount admitted by answer to be due (Wisconsin).
1763. Notice of motion that the defendant satisfy that part of the plaintiff's claim admitted to be just (Wisconsin).
1764. Order thereon. |
|--|--|

1717. Notice of motion for extension of time to answer.

[Title.]

TAKE NOTICE that on the affidavit of C..... D....., a copy of which is herewith served, and upon the complaint heretofore served and filed, the undersigned will move the court, at a special term thereof to be held at on the day of, 19.., at o'clock in the forenoon, to enlarge the time to answer herein days, or for such other relief as may be just.

Dated, 19..

G.... H....
Defendant's Attorney.

To E.... F...., Esq.,
Plaintiff's Attorney.

1718. Affidavit for extension of time to answer.

[Title.]

[Venue.]

C.... D...., being duly sworn, says:

I. That he is the defendant in the above entitled action, and intends in good faith to defend the same.

II. That he has fully and fairly stated the case in this cause to G.... H...., his counsel therein, who resides in the village of [or, at No., ... street, in the city of], and that he has a good and substantial defense, on the merits, to the whole of said action, as he is advised by his said counsel, and verily believes. [Or if the defense be to part only, state particularly what part].

III. [State excuse, e. g., thus]: That he was compelled to leave the city of in which he resides, on business, immediately after being served with the summons herein, and remained absent for two weeks, since which he has not had time to instruct his counsel concerning his answer in this cause, and that days further time is necessary therefor. That the

complaint was served on the day of, 19.., and the time to answer expires on the day of, 19.., and no extension of such time has been had [*or if any, state what*].

C.... D....

[*Jurat.*]

1719. Order extending time to plead.

On the annexed affidavit of C.... D...., and upon the complaint herein,

ORDERED that the said defendant have ... days additional time [*or until the day of, 19..*] to answer the complaint herein.

Dated, 19..

L.... M....

Judge.

1720. Notice of motion to make pleading more definite and certain.

[*Title.*]

SIR: Please take notice that upon the [complaint] heretofore served in this action, the defendant, by his counsel, will move the court at the next regular term thereof, to be held at the court house, in the city of on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order requiring the complaint herein to be made more definite and certain in this respect, to-wit: [*here state the respects in which greater definiteness and certainty are deemed necessary*].

Dated, 19..

G.... H....

Defendant's Attorney.

To E.... F...., Esq.,
Plaintiff's Attorney.

1721. Order thereon.

[*Title.*]

The motion of the defendant for an order requiring the complaint herein to be made more definite and certain coming on to be heard before the court on the day of, 19..;

Upon the complaint herein, and on motion of G.... H...., Esq., attorney for the defendant,

ORDERED, that the plaintiff make his complaint herein definite and certain by amendment, by showing [*here state the respects in which it is to be amended*], and that within ... days after service of this order on his attorney, he serve on the de-

fendant's attorney a copy of the complaint as amended, and pay ten dollars, the costs of this motion.

By the Court:

J.... K...., Circuit Judge.

1722. Notice of motion for leave to serve amended pleading, copy served with motion.

[*Title.*]

TAKE NOTICE that upon the affidavit of C..... D....., and proposed amended answer [*or other pleading*] copies of which are herewith served, and upon the pleadings served in this action, the undersigned will move the court, at a special term to be held at in the city of on the day of next, at o'clock in the noon, for leave to file and serve such amended answer [*or other pleading*] in this action, and for such other and further order as may be just.

[*Date.*]

G.... H....

Defendant's Attorney.

[*Address.*]

[*The affidavit on which the motion is based should set forth the facts which are relied upon to excuse the defect and justify the application for leave to amend.*]

1723. Notice of motion for leave to amend, amended pleading not served.

[*Title of the cause.*]

TAKE NOTICE that on the affidavit of C.... D...., herewith served, and on all the pleadings and proceedings in this action, the undersigned will move the court, at a special term thereof to be held at on the day of, 19.., at o'clock in the noon, * for leave to amend his complaint [*or other pleading*] herein, by the insertion of the following clause in place of the fifth paragraph thereof [*or otherwise indicate the nature of the amendment sought to be made*], or for such other or further relief as may be just.

[*Date.*]

G.... H....

Defendant's Attorney.

[*Address.*]

[*The better practice is to draw the proposed pleading and serve same with the motion, as indicated in the last preceding form.*]

1724. Order allowing amended pleading.

[Title.]

[At a special term, etc.]

On reading and filing the affidavit of C.... D.... [and upon the proposed answer heretofore served, and upon the pleadings herein], and on motion of G.... H.... for plaintiff, after hearing E.... F.... [or, no one appearing] in opposition:

ORDERED, that the defendant have leave to * serve an answer in this action, amended by substituting, for the fifth paragraph of the original answer, the words "....," within days from the date of this order, on payment of dollars costs to the plaintiff [and that plaintiff have leave to demur thereto within the usual time].

[Or in case proposed amended pleading has been served with the motion]: ORDERED, that the defendant have leave to amend his original answer by substituting therefor the proposed amended answer already served, and that the service of said amended answer already made stand as due service thereof, upon payment of dollars, motion costs, and that the plaintiff have leave to demur or plead thereto on or before , 19..

1725. Notice of amended pleading, when copy has not been served with the motion.

Please take notice, that the within is a copy of the amended complaint [or answer, or reply] in this action.

[Date.]

[Signature.]

[Address.]

1726. Order giving leave to amend formal error.

[As in Form 1724 to the *, continuing]: amend his answer on file in this action, by inserting [or canceling] the word [designating the error] after the word "...." in folio

1727. Notice of motion to amend complaint by striking out co-plaintiffs, and making them defendants.

[As in Form 1723 to the *, continuing]: that the plaintiffs may be at liberty to amend their complaint by striking out the names of A.... B.... and C.... D.... as plaintiffs, and making them defendants, without costs as to the other defendants; and for such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1728. The same, by adding defendant.

[As in Form 1723, to the *, continuing]: that the plaintiff may have leave to amend his summons and complaint in this

action by adding W.... X.... as a defendant therein, with apt words to charge him; and for such other relief as may be just.
[Date.]

[Signature.]

[Address.]

1729. The same, by correcting fictitious name.

[As in Form 1723 to the *, continuing]: that the plaintiff have leave to substitute the name of as the real name of the defendant in this action, wherever the name Richard Roe occurs in the papers filed in this action; or for such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1730. Affidavit to obtain leave to correct fictitious name.

[Title.]

[Venue.]

A.... B...., being duly sworn, says:

I. That he is the plaintiff in this action:

II. That he was not acquainted with the real name of the defendant in this action until after the commencement of this action, and [about one week ago].

III. That the defendant's real name is E.... F.... and not C.... D....

A.... B....

[Jurat.]

1731. Order thereon.

[Commencement as in Form 1724].

ORDERED that the name of E.... F.... be substituted in place of that of C.... D.... as the real name of the defendant in this action.

1732. Affidavit for leave to file supplemental complaint.

[Title.]

[Venue.]

A.... B...., being first duly sworn says that he is the plaintiff in the above entitled action, which was commenced on the day of, 19.., and is brought for the purpose of [here state the general object of action], and that issue has been joined therein [and is now on the calendar and noticed for trial at the present term].

That it becomes necessary for defendant to file and serve a

supplemental complaint in this action, for the following reasons, to-wit [*here state facts showing necessity*].

That the plaintiff was ignorant of said facts when his former complaint was made.

Or, that said facts have occurred since his former complaint herein was made.

A.... B....

[*Jurat.*]

1733. The same, copy of supplemental pleading served with motion.

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says:

I. That he is the plaintiff above named; that this action was commenced in this court by the service of a summons and complaint on the day of, 19..; that the action is brought for the purpose of [*state briefly the object of the suit, as, the foreclosure of a certain mortgage, particularly described in the complaint herein*]; that issue has been joined herein, and the cause is now upon the calendar of this court, awaiting trial.

II. Deponent further says, that he has read the annexed draft of the proposed supplemental complaint, and the facts therein stated are true, to the best of deponent's knowledge and belief. That said facts did not occur [*or, did not come to the knowledge of this deponent, nor had he any information thereof*] until after the service of the original complaint herein.

A.... B....

[*Jurat.*]

1734. Notice of motion for leave to file supplemental complaint.

[*Title.*]

TAKE NOTICE, that upon the affidavit of A.... B.... [and copy of the proposed supplemental complaint] herewith served, and upon all the pleadings and proceedings in this action, the undersigned will move the court, at a special term to be held at on the day of, 19.., etc., for leave to file and serve such supplemental complaint in this action [*or, to serve a supplemental complaint setting up the matters contained in the annexed affidavit*]; or for such other relief as may be just. [*Date.*]

E.... F....,
Defendant's Attorney.

[*Address.*]

1735. Order allowing supplemental complaint.

[Title.]

[At a special term, etc.]

On reading and filing [*describe motion-papers*], and on motion of E.... F.... for the plaintiff, and after hearing G.... H.... [or, no one appearing] in opposition:

ORDERED, that the plaintiff have leave to serve, within days after this date, a copy of the supplemental complaint filed upon this motion, on payment to the [defendant] of dollars costs.

[Or, ordered, that the plaintiff have leave to make and file the proposed supplemental complaint herein upon payment of dollars costs of motion to the defendant, and further that upon such payment being made, the service of said supplemental complaint heretofore made stand as the completed service thereof, and that the defendant have time to plead to said supplemental complaint until and including, 19..]

1736. Affidavit on application to file supplemental answer.

[Title.]

[Venue.]

C.... D...., defendant above named, being duly sworn, says:

I. That this action was commenced on the day of, 19..; that issue was joined therein by the service of this defendant's answer on the day of, 19.., and this cause is now pending upon the calendar of this court, awaiting trial.

II. Deponent further says, that this action is brought upon a promissory note alleged to have been made by him, and to be held and owned by the plaintiff. That since the joining of the issue, viz., on the day of, 19.., this defendant paid to the plaintiff the sum of dollars in full payment of the note mentioned in the complaint, and of the costs up to that day, accrued therein. [*Or otherwise state new facts.*]

1737. Order granting leave to make a supplemental answer.

[Title.]

[At a special term, etc.]

[Recitals as in Form 1735.]

ORDERED, that the defendant be allowed to make a supplemental answer herein, setting up payment of the note in suit [or, as proposed by him], upon payment to the plaintiff of dollars motion costs; such answer [or complaint] to be served upon the attorney for the plaintiff [or defendant] within days from the entry of this order [the issue to stand as of the day of, 19..].

[Or provide that supplemental answer already served stand without further service as in Form 1735, in case of supplemental complaint.]

1738. Notice of motion to compel reply.

[Title.]

Please take notice that upon the pleadings in this action the undersigned will move the court, at a special term thereof to be held at on the day of, 19.., at o'clock in the forenoon, or as soon thereafter as counsel may be heard, to require a reply to the new matter by way of avoidance, set up in the answer in this action, or for such other relief as may be just.

[Date.]

G.... H....,
Defendant's Attorney.

[Address.]

[This and following form to be used in North and South Dakota when such matter is to be replied to-only when directed by the court. N. Dak. Rev. Codes sec. 5277; S. Dak. Rev. Codes C. P. sec. 130.]

1739. Order thereon.

[Title of cause.]

[At a special term, etc.]

On reading and filing the pleadings herein, and notice of this motion [and proof of due service], and on motion of G.... H...., for the defendant, after hearing E.... F.... [*or*, no one appearing] in opposition:

ORDERED, that the plaintiff reply to the new matter by way of avoidance, contained in the answer herein, within twenty days from service of a copy of this order.

1740. Affidavit on motion to dismiss for failure to file complaint and pay state tax (Wis. Stats. 1898 sec. 2632).¹

[Title.]

[Venue.]

G.... H...., the defendant's attorney, being duly sworn, says that the summons was served in this action on the day of, 19.., and that defendant's answer [*or* demurrer]

¹This provision is peculiar to Wisconsin. In some states it is required that the petition or complaint be filed within a certain time, or by a certain day of the term; in such states this and the following forms may be used with

such changes as are necessary to bring the case within the statute of the particular state. Minn. Rev. Laws 1905 sec. 4121; district court rule XVI; Iowa Code sec. 3515.

thereto was served on the day of, 19.., and that said summons has not been filed in said county, nor the state tax on the action paid, as appears by the annexed certificate of the clerk thereof.

G.... H....

[*Jurat.*]

1741. Certificate that summons is not filed, nor tax paid (Wisconsin).

[*Title.*]

I, M.... N...., clerk of the court, do hereby certify that the summons in the above entitled action has not been filed in my office at this date, nor has the state tax on said action been paid.

[*Date.*]

L.... M....,
Clerk of Court.

1742. Order thereon (Wisconsin).

[*Title of the cause.*]

It appearing to my satisfaction that the summons in this action has not been filed, nor the state tax on said action been paid, and that more than ten days has elapsed since the service of the answer [*or demurrer*] to the complaint herein:

ORDERED, that this action be dismissed unless the plaintiff shall pay said state tax, together with five dollars costs of motion to the defendant on or before, 19..

By the Court:

N.... O...., Judge.

1743. Notice indorsed on pleading returned for irregularity.

Please take notice that the within answer is returned as defective and irregular, in this, that it is not folioed, nor fairly and legibly written, and that separate defenses are not separately stated, nor plainly numbered; nor do they refer to the causes of action which they are intended to answer, in such manner that they may be intelligibly distinguished [*or otherwise state the irregularity*].

[*Date.*]

[*Signature.*]

[*Address.*]

1744. Notice of irregularity in respect to one of several persons pleading together.

[*Title.*]

Please take notice that I object to the answer this day served on me, as defective and irregular on the part of the defendant

W.... X...., in this, that it is not verified on his part; and I refuse to receive it as his answer.

1745. Notice of motion to require attorney to receive pleading.
[*Title.*]

Please take notice that on the affidavits annexed, and on the pleadings in this action, the undersigned will move the court, at a special term to be held at on the day of, 19.., etc., to require the plaintiff to receive the answer heretofore served upon his attorney, or that upon his refusal to receive the same, such answer may stand as the answer in the cause, and as duly served on the day of, 19..; or for such other relief as may be just, with the costs of this motion.

[*Date.*]

[*Signature.*]

[*Address.*]

1746. Order thereon.

[*Title.*]

[*At a special term, etc.*]

On reading and filing [*motion papers*], and upon motion of G.... H...., defendant's attorney, after hearing E.... F...., plaintiff's attorney in opposition:

ORDERED, that the plaintiff receive the answer heretofore served upon him in this action, if served anew, together with a copy of this order [within days after the date of this order]; or that, upon his refusal so to do, such answer stand as the answer in the cause, and as duly served on the day of, 19..

1747. Notice of motion to strike out irrelevant, redundant or scandalous matter.

[*Title.*]

Take notice that upon the pleadings in this action [and the affidavit of C.... D.... herewith served], the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard,* to strike out all of the third paragraph of the complaint [*or answer*] herein, and so much of the fifth paragraph as is contained between the word "...." and the word "...." [*or so much thereof as is contained between the word "...." in folio, and the word "....," in folio*], both inclusive, as irrelevant and redundant [*or as scandalous*], and for such other relief as may be just [with costs].

[*Date.*]

[*Signature.*]

[*Address.*]

1748. Order thereon.

[Title.]

[At a special term, etc.]

On reading and filing [*describe motion papers*] and on motion of G.... H.... for the [defendant], and after hearing E.... F.... in opposition thereto [*or*, and on proof of due service of notice of the motion, and no one appearing in opposition thereto]:

ORDERED, that the matter contained in the [complaint] in this action, from the word "and," in folio ten thereof, to the word "plaintiff," in folio twenty-one, be stricken out as redundant [*or irrelevant*]; and that as to the matter contained in the second paragraph, said motion be denied, and that the defendant have dollars costs of this motion.

1749. Notice of motion to compel plaintiff to elect between several counts setting forth the same cause of action.

[Title.]

Please take notice that upon the summons and complaint in this action [and on an affidavit, of which a copy is herewith served], the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the ...noon, or as soon thereafter as counsel can be heard, that the plaintiff be required to elect between the first stated cause of action and the second stated cause of action in the complaint, and state which he will rely on; and that on such election the other be stricken out; or in default of so electing, then that the second stated cause of action be stricken out as redundant; and for such other or further relief as may be just [and for the costs of this motion].

[Date.]

[Signature.]

[Address.]

1750. Affidavit for same.

[Title of the cause.]

[Venue.]

C.... D...., being duly sworn, says:

I. That he is the defendant in the above entitled action. [*Or if otherwise, show in some way deponent's knowledge of the circumstances involved.*]

II. That the plaintiff's complaint herein purports to set forth two causes of action, but that only one transaction of the nature mentioned in either of the supposed causes of action set up in the complaint ever occurred between the defendant and the

plaintiff, and that the transactions mentioned in both of the said supposed causes of action are in reality one and the same.

C.... D....

[*Jurat.*]

1751. Order requiring election.

[*Title.*]

The motion of the defendant that the plaintiff be required to elect as to which cause of action alleged in his complaint he will rely upon on the trial, coming on to be heard on the day of, 19..; and on reading the complaint and the affidavit of C.... D...., now filed herein, and after hearing G.... H.... for the motion, and E.... F.... opposing, and being advised in the premises:

ORDERED, that the plaintiff be required to elect, within days after service of a copy of this order on his attorney, upon which of the several causes of action stated in his complaint he will rely on the trial, and that he make such election by written notice served upon the defendant's attorney.

That if plaintiff fails to so elect, the *second* and *third* causes of action be stricken out as redundant and irrelevant.

That defendant have dollars, his costs of this motion.

By the Court:

J.... K...., Judge.

1752. Notice of motion to strike out answer.

[*Title of cause.*]

Take notice that on the affidavit herewith served, and on the pleadings in this action, the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to strike out the answer herein as sham [*or*, the first defense in the answer herein as sham, and the second defense as irrelevant]; or for such other relief as may be just [with costs].

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*Address.*]

1753. Affidavit to falsity of answer.

[*Title of the cause.*]

[*Venue.*]

A.... B...., being duly sworn, says:

I. That he is the plaintiff in the above entitled action.

II. That he has read the answer of the defendant Y....

Z.... herein, and that the defense of payment therein set up is wholly and absolutely false; that the defendant has never paid, or in any way satisfied, the demand set up in the complaint, nor any part thereof; nor has he ever paid, by himself or his agents, to the plaintiff, or to any of his agents, any part of the sum alleged by the said answer to have been paid.

III. That the only person ever employed by deponent to ask or receive money from the defendant is one E.... F...., whose affidavit is hereto annexed; and that, to the best of deponent's knowledge and belief, no other person ever asked or received anything from the defendant for account of this deponent.

[*Or:* That the statements of said answer that [*here give them*] are utterly and absolutely false, and that said answer is a sham answer; and, on the contrary of said statements, the affiant alleges [*here contradict the sham matters set up*].

A.... B....

[*Jurat.*]

[*It will be wise to have corroborative affidavits.*]

1754. Corroborative affidavit.

[*Title of the cause.*]

[*Venue.*]

E.... F...., being duly sworn, says:

I. That he is a clerk in the employment of the plaintiff, and attends to the collection of the debts due to the latter.

II. That he has frequently asked the defendant for payment of the amount demanded by the complaint in this action, and the defendant has always refused to pay the same, and never has paid any part thereof to deponent; nor, so far as deponent is informed and believes, to any other person.

E.... F....

[*Jurat.*]

1755. Order thereon.

[*Recitals as in Form 1748.*]

ORDERED, that the answer of the defendant C.... D.... in this action be stricken out as sham, with dollars costs to plaintiff.

1756. Notice of motion to strike out one defense as sham, and for judgment upon the other as frivolous.

[*As in Form 1747 to the *, continuing*]: That the first defense in the answer herein be struck out as sham or irrelevant, and that the second defense be overruled as frivolous, and that

judgment be given for the plaintiff thereon; or for such [*etc., concluding as in Form 1747*].

1757. Notice of motion for judgment on frivolous pleading
(Wis. Stats. 1898 sec. 2681).

[*Title.*]

SIR: Please take notice that upon the pleadings heretofore served herein, the plaintiff will move the court, at the next regular term thereof, to be held in the of, on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order striking out the answer of the defendant herein, as sham, frivolous and irrelevant, and for judgment or such other or further order or relief as the court may grant.

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*Address.*]

1758. Order striking out an answer in part as frivolous and in part as irrelevant (Wis. Stats. 1898 sec. 2684).

[*Title.*]

[*Recitals as in Form 1748.*]

ORDERED, that the matter in the answer of the defendant herein alleged as a first defense be stricken out as frivolous, and that the following matter alleged in the second defense in said answer be stricken out as irrelevant [*here specify the matter to be stricken out, with particularity*], [and that the defendant, within days after the service of this order on his attorney, serve an amended answer, omitting therefrom the matter hereby stricken out] and that he pay dollars, the costs of this motion.

By the Court:

J.... K...., Circuit Judge.

1759. Order for judgment on frivolous pleading.

On reading and filing the pleadings in this action, and notice of this motion [and proof of due service thereof], and on motion of G.... H.... for the defendant, and after hearing E.... F.... [*or, no one appearing*] in opposition thereto:

ORDERED, that the answer [*or the demurrer*] of the defendant Y.... Z.... herein be stricken out as frivolous; * and that the plaintiff have judgment thereon for the relief demanded in the complaint, with costs of this action, and dollars costs of this motion.

1760. The same, reserving leave to amend.

[*As in preceding form to the *, continuing*]: with leave to the defendant to answer [anew] within days after service of this order upon [*state terms*]; and that if he fail to do so, that the plaintiff have judgment thereon for the relief demanded in the complaint, with costs of this action, and dollars costs of this motion.

1761. Notice of motion by plaintiff for judgment on the pleadings.

[*Title.*]

SIR: Please take notice that upon the complaint and answer in this action, the undersigned will move the court at the next regular [*or special*] term thereof, to be held at the court house in the of, county of, on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for the judgment demanded in the complaint, and such other order or relief as the court may

E.... F....,

Plaintiff's Attorney.

[*Address.*]

....., Wis.

1762. Notice of application for judgment for amount admitted by answer to be due (Wis. Stats. 1898 sec. 2892).

[*Title of action.*]

SIR: Please take notice that on the complaint and answer herein the undersigned will, on the day of, 19.., at o'clock in the ...noon, apply to the clerk of said court, at his office, in the city of, in said county, to enter judgment for the plaintiff herein, for the amount which is admitted by the answer to be due, to-wit, the sum of dollars [*or, for the amount claimed in the complaint, after deducting the amount of the defendant's counter-claim or set-off*], to-wit, the sum of dollars.

[*Date.*]

E.... F....,

Attorney for Plaintiff,

....., Wis.

To G.... H...., Esq.,
Attorney for Defendant.

1763. Notice of motion that the defendant satisfy that part of the plaintiff's claim admitted to be just (Wis. Stats. 1898 sec. 2892).

[*Title.*]

SIR: Please take notice that upon the complaint and answer heretofore served herein, the undersigned will move the court at

the next regular [*or special*] term thereof, at the court house in the of, in county, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order requiring the defendant to satisfy that part of the claim of the plaintiff admitted by the defendant in his answer to be just, to-wit, [*here specify the part admitted*] ; and for such other order or relief as may be properly granted.

[*Date.*]

E.... F....,
Plaintiff's Attorney,
....., Wis.

To G.... H...., Esq.,
Defendant's Attorney.

1764. Order thereon.

[*Recitals as in Form 1748.*]

On motion of O.... P...., plaintiff's attorney:

ORDERED, that the defendant herein satisfy that part of the plaintiff's claim which he admits by his answer to be just, by [paying to the plaintiff, within days after the service of this order, the sum of dollars].

By the Court: ,
J.... K...., Judge.

CHAPTER CXXVI.

REVIVAL OR CONTINUANCE OF ACTIONS.

- | | |
|--|--|
| <p>1765. Notice of motion on death or disability of plaintiff.</p> <p>1766. Petition by receiver or assignee of plaintiff's title, to continue action in his own name.</p> <p>1767. Petition by executor, administrator, or heir of deceased plaintiff.</p> <p>1768. Order for revivor and continuance.</p> <p>1769. Notice of motion for leave to continue action, and serve supplemental complaint.</p> <p>1770. Order, by consent, substituting executors, without prejudice to proceedings already had.</p> <p>1771. Petition by surviving plaintiff to compel representative of deceased co-plaintiff to continue.</p> <p>1772. Petition by defendant to have action continued, plaintiff having died, and action not having been revived on his behalf.</p> <p>1773. Order to show cause, on the foregoing petition.</p> | <p>1774. Order thereon, absolute.</p> <p>1775. Another form, in the alternative.</p> <p>1776. Notice of motion to declare action dismissed, unless the proper parties revive it (Wisconsin).</p> <p>1777. Affidavit.</p> <p>1778. Order thereon.</p> <p>1779. Notice of motion by plaintiff to revive action against personal representatives of deceased defendant.</p> <p>1780. Affidavit therefor.</p> <p>1781. Order thereon.</p> <p>1782. Affidavit of attachment issued, and death of defendant before publication of summons completed.</p> <p>1783. Order thereon.</p> <p>1784. Stipulation in action against corporation, on the expiration of its charter, to continue in the name of new corporation.</p> <p>1785. Notice of motion to substitute officer's successor.</p> <p>1786. Affidavit therefor.</p> <p>1787. Order thereon.</p> |
|--|--|

The codes generally provide that any action which survives shall not abate by the death, marriage, or other disability of a party, or by the transfer of interest or devolution of liability; but may be continued on application to the court in the name of the proper party. Wis. Stats. 1898 secs. 2800-2810; Minn. Rev. Laws 1905 sec. 4064; Iowa Code secs. 3443-3445; N. Dak. Rev. Codes sec. 5234; S. Dak. Rev. Codes C. P. sec. 91; Cobbe's Ann. Stats. of Nebr. secs. 1446-1463.

1765. Notice of motion on death or disability of plaintiff.

[Title of original action.]

Please take notice that on the annexed verified petition, and on the pleadings in this cause [and upon the proposed supplemental

complaint herewith served], the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order directing the * above entitled action to be continued by C.... D.... [*describing his official or trust capacity, if any*] as plaintiff, in place of A.... B...., plaintiff above named, and granting the said C.... D.... leave to amend the complaint herein, as he shall be advised [*or, leave to serve and file the said proposed supplemental complaint*], and for such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1766. Petition by receiver or assignee of plaintiff's title, to continue action in his own name.

[Title.]

To the court, held in and for the county of

THE PETITION of C.... D.... shows to the court:

I. That on or about the day of, 19.., one A.... B...., above named, commenced the above entitled action in this court * for [*here state briefly the cause of action, and then proceed to show what stage the cause is in, e. g., thus*], that issue was joined therein by the service of the defendant's answer on the day of, 19..; that said action was referred, by order of this court, on the day of, 19.., to R.... F...., Esq., to hear and determine the same; that the trial thereof is now pending and undetermined before him.

II. That pending said action, and on the day of, 19.., upon application duly made by O.... P...., a judgment-creditor of said A.... B.... in proceedings supplementary to execution, your petitioner was, by the order of [*name court or officer*] duly appointed receiver of the property of said A.... B....

[Or: II. That pending said action, and on the day of, 19.., said A.... B...., plaintiff in said action, duly assigned and transferred the note in the complaint mentioned, for a valuable consideration, to your petitioner, who is now the lawful owner and holder thereof.]

WHEREFORE your petitioner prays that he may be substituted as plaintiff in said action in place of said A.... B...., and that said action may be continued in his name, and that he may have such other relief as may be just.

[Date.]

[Signature.]

[Venue.]

C.... D...., being duly sworn, says that he has read [*or heard read*] the foregoing petition subscribed by him, and knows

the contents thereof; and that the same is true of his own knowledge, expect as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[Signature.]

[Jurat.]

1767. Petition by executor, administrator, or heir of deceased plaintiff.

[Title as in Form 1765.]

To the court in and for the county of

THE PETITION of C.... D.... and E.... F...., executors of the last will and testament [*or*, administrators of the estate of A.... B...., deceased [*or*, heirs of A.... B...., deceased], shows to the court:

I. That on or about the day of, 19.., one A.... B.... commenced the above entitled action in this court for [*state the cause of the action, and its condition, as in Form 1766*].

II. That said A.... B.... died on or about the day of, last, and pending said action, having first duly made and published his last will and testament, by which, among other things, he appointed your petitioners his executors; that your petitioners have proved said will, and letters testamentary thereon were duly made and issued to them by the court of the county of on the day of, 19.., and that they have duly qualified and undertaken the execution thereof.

[*Or, where the application is by administrators:* II. That said A.... B.... died intestate on or about the day of, 19.., and pending said action; and that letters of administration upon his estate were duly made and issued, on the day of, last, by the court of the county of, to the petitioners, who have qualified and entered upon their duties as such administrators.]

III. That at the time of his death the said note [*or other cause of action*], was still owned by the said A.... B....; and the amount thereof, with the interest thereon, is still due from the said defendant; and the said [note] is now held by these deponents, and forms a part of the assets in their hands belonging to the estate of said A.... B...., deceased.

[*Or, where the application is by heirs, substitute for II and III above:* That said A.... B.... died intestate on or about the day of, 19.., and pending said action, and leaving your petitioners, who are his only children, his heirs-at-law, and as such they inherited all his interest and estate in the lands which are the subject of said action.]

IV. That your petitioners are desirous of continuing the ac-

tion above referred to, as executors [or administrators, or heirs] of said A.... B...., against said Y.... Z....

WHEREFORE, your petitioners pray that said action may be so continued by them, and that your petitioners may have leave to amend the complaint herein, setting forth the facts above stated [or to serve and file the annexed proposed supplemental complaint herein], and for such further relief as may be just.

[Date.]

[Signatures.]

[Verification as in last preceding form.]

[If the application is made more than a year after the death, it should be on a proposed supplemental complaint served with the motion. Wis. Stats. 1898 sec. 2803; N. Dak. Rev. Codes sec. 5234; S. Dak. Rev. Codes sec. 91. If the application be made more than a year after the death, the moving affidavits should show facts excusing the delay.]

1768. Order for revivor and continuance.

[Title.]

[At a special term, etc.]

On reading and filing the petition of C.... D...., dated the day of, 19.., and the pleadings in this action [and the proposed supplemental complaint herein] [and proof of due service of notice of this motion], and on motion of Q.... R.... counsel for said C.... D.... assignee [or receiver, or executor, or administrator, or heir] of the plaintiff, deceased, and after hearing O.... P...., of counsel for the defendant [or no one appearing] in opposition, *

ORDERED, that the above entitled action be continued by C.... D...., as plaintiff herein, in the place of A.... B...., plaintiff above named, and that the above entitled action be continued by him as receiver [or otherwise] of said A.... B.... [and further that he be allowed to amend the complaint herein as he shall be advised, or that he be allowed to make and file the said proposed supplemental complaint and that the service thereof heretofore made upon this motion stand as the completed service thereof].

[In Nebraska the order should be conditional and may be as follows after the *]:

ORDERED, that the defendants show cause before this court, at the court house in the of on the first day of the term, to-wit, the day of, 19.., or as soon thereafter as counsel can be heard, why the said action should not be revived in the name of R.... C.... as receiver [or otherwise] of the said A.... B...., and that if they fail so to do the

action shall stand revived in the name of R.... C.... as receiver [*or otherwise*] as plaintiff.

[*Date.*]

By the Court:

J.... K...., Judge.

1769. Notice of motion for leave to continue action, and serve supplemental complaint.

[*Title.*]

Take notice that on the affidavit of C.... D.... and the proposed supplemental complaint of which copies are herewith served upon you, and on the pleadings in this action, C.... D...., as executor of the plaintiff, will move the court, at a special term thereof to be held at in on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for leave to continue this action in the name of the said [executor] as plaintiff, and to serve and file said supplemental complaint in this action; or for such other or further relief as may be just.

[*Date.*]

O.... P....,

Attorney for C.... D....,
Executor.

[*Address.*]

1770. Order, by consent, substituting executors, without prejudice to proceedings already had.

[*Title.*]

[*At a special term, etc.*]

On reading and filing the affidavit of M.... N...., showing the death of A.... B...., the plaintiff in the above entitled action, and the granting of letters testamentary, under and by virtue of his last will and testament, to C.... D.... and E.... F...., by the court of county, and on motion of M.... N...., plaintiff's attorney * [the defendant's attorney consenting thereto]; or,

ORDERED, that this action be and the same is hereby revived and continued in the name of the said C.... D.... and E.... F...., executors of the last will and testament of A.... B...., deceased, as plaintiffs; and that the said executors be and they hereby are substituted as plaintiffs in the place and stead of the said A.... B...., deceased, and that such revivor and continuance be without prejudice to any of the proceedings already had in this action

1771. Petition by surviving plaintiff to compel representative of deceased co-plaintiff to continue.

[*State action by two plaintiffs and death of one, leaving joint interest in his representatives and the survivor; see Form 1772 to the *, and continue*]: the said action has not been revived or continued, or anything done therein; and that said [*representative*] refuses to allow your petitioner to continue said action in his name as administrator, as one of the plaintiffs.

WHEREFORE your petitioner prays for an order requiring the said [*representative*] to join your petitioner in an application to have the said action revived and continued in the name of the said [*representative*] as administrator as aforesaid, and this petitioner as plaintiff, by a certain time therein to be specified; or that your petitioner be allowed to take such proceedings as may be necessary to revive and continue said action, making the said [*representative*] administrator as aforesaid a party-defendant in said action.

[*Date.*]

[*Signature.*]

[*Verification as in Form 1766.*]

1772. Petition by defendant to have action continued, plaintiff having died, and action not having been revived on his behalf.

[*Title.*]

To the court, held in and for the county of

THE PETITION of Y.... Z...., defendant above named, shows to this court:

I. That on or about the day of, 19.., A.... B.... above named commenced an action, in this court, against this defendant for [*here state the cause of action and its condition, as in Form 1766.*]

II. That as petitioner is informed and believes, A.... B...., plaintiff above named, died on or about the day of, last, having first made and published his last will and testament in due form of law, by which among other things, he appointed C.... D.... and E.... F.... his executors; that they have proved said will, and taken upon themselves the execution thereof; but, to the best of your petitioner's information and belief, * have failed to make any application to have the above entitled action continued by them as plaintiffs.

WHEREFORE your petitioner prays that the above entitled action may be continued in their names, or that the complaint herein be dismissed, so far as their interests are concerned, and that your petitioner have judgment thereupon against the said.

C.... D.... and E.... F...., as executors aforesaid, for the costs of such action; or for such other order as may be just.

[Signature.]

[Verification as in Form 1766.]

1773. Order to show cause, on the foregoing petition.

On the within petition, let the plaintiffs show cause at a special term, to be held at on the day of, 19.., at o'clock in the forenoon, why the above entitled action should not be continued in the names of C.... D.... and E.... F...., executors above named, or the complaint herein be dismissed, so far as the interests of said executors are concerned, with costs [or why the petition should not be granted].

1774. Order thereon, absolute.

[As in Form 1768 to the *, continuing]:

ORDERED, that the above entitled action be continued in the names of C.... D.... and E.... F.... as executors of A.... B...., plaintiff above named [or, that the complaint herein be dismissed so far as the interests of C.... D.... and E.... F...., executors of A.... B...., plaintiff above named, are concerned; and that the defendant have leave to enter judgment against said C.... D.... and E.... F...., as executors, for the costs of the action, with dollars costs of this motion].

1775. Another form, in the alternative.

[As in Form 1768 to the *, continuing]:

ORDERED, that the said C.... D...., executor as aforesaid, revive and continue said action, by filing and serving a supplemental complaint therein, within twenty days after service of a copy of this order; or that, in default thereof, the complaint in said action be dismissed, and the defendant have leave to enter judgment against the said C.... D...., executor, as aforesaid, for the costs of such action.

1776. Notice of motion to declare action dismissed, unless the proper parties revive it (Wis. Stats. 1898 sec. 2811).

[Title.]

TAKE NOTICE; that on the affidavit of which a copy is herewith served, the undersigned will move the court at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard,* to require this action to be revived and continued by the executor of the above named A.... B...., deceased, as

plaintiff herein, within a time to be fixed by the court, or that, in default thereof, the action shall stand dismissed; or for such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1777. Affidavit.

[Title.]

[Venue.]

Y.... Z...., being duly sworn, says:

I. That he is the defendant in the above entitled action.

II. That this action is brought to recover [*state nature and object of action briefly, and the condition of the cause*].

III. That, as deponent is informed and believes [after issue was joined], in this action, to-wit, on the day of, 19.., the above named plaintiff died, having first made and published his last will and testament, by which he appointed C... D...., of, his sole executor.

IV. That letters testamentary have been duly made and issued by the court of to the said C.... D...., who has accepted the same, and entered upon the duties of his office, and that no application to revive or continue this action has been made by said C.... D....

[Signature.]

[Jurat.]

1778. Order thereon.

[As in Form 1770 to the *, continuing]:

ORDERED, that C.... D...., executor of the above named A.... B...., deceased, be at liberty to continue this action as plaintiff therein in place of the said A.... B...., and that in the event of his failure to appear and proceed therein as such, within months after service of a copy of this order upon, this action be dismissed.

1779. Notice of motion by plaintiff to revive action against personal representatives of deceased defendant.

[As in Form 1776 to the *, continuing]:

For an order directing the above entitled action to be continued against C.... D.... and E.... F...., as executors of the last will and testament of [*or, administrators of the estate of, or, heirs of*] Y.... Z...., defendant above named, deceased, in the place of said deceased defendant; and granting leave to this

plaintiff to amend the complaint herein as he shall be advised; and such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1780. Affidavit therefor.

[Title.]

[At a special term, etc.]

[Venue.]

A.... B...., being duly sworn, says:

I. That on or about the day of, 19... , he commenced an action in this court against the defendant above named, for [*state cause of action, and its condition, as in Form 1766*].

II. That, as deponent is informed and believes, said defendant died on or about the day of, last, having first duly made and published his last will and testament, by which, among other things, he appointed L.... M.... and N.... O...., his executors, who have proved said will; and that letters testamentary thereon have been duly issued to them by the court, of the county of, and they have duly qualified and undertaken the execution thereof.

[*For statement as to an administrator or heir, see Form 1767.*]

III. That said action is still pending and undetermined, and no proceedings to continue it have been taken, to the knowledge of the deponent.

[Signature.]

[Jurat.]

1781. Order thereon.

[*Commencement as in Form 1787.*]

ORDERED, that C.... D.... and E.... F...., executors of Y.... Z...., defendant above named, appear and answer the complaint herein within days from the service of a copy of this order upon them; or that, in default thereof, the plaintiff may apply to the court for an order entering their appearance and directing the action to stand revived and continued against them as executors of said Y.... Z...., and that the answer of said X.... Y.... be then deemed the answer of said executors [*or, if no answer had been put in, and that he then have judgment for failure to answer*].

[*In Nebraska the order should be conditional. See Form 1768.*]

1782. Affidavit of attachment issued, and death of defendant before publication of summons completed.

[*Commencement as in other cases, and stating the nature of the cause of action.*]

I. That on the day of, 19.., he commenced proceedings for the purpose of bringing thereon an action against the defendant Y.... Z.... by publication of the summons against him, pursuant to the provisions of the statute, the said defendant being a non-resident of the state of and residing in the town of in the state of

II. That during the time of such publication, the deponent procured an attachment to be issued in his favor, in said action, against the said Y.... Z....; upon which, during the lifetime of the said Y.... Z.... the sheriff of the county of seized a large quantity of goods, the property of the said Y.... Z...., of the value of dollars; and thereafter the said goods were so seized by the said sheriff, and before the said publication was completed, the said Y.... Z.... died, on or about the day of, 19..

[*Allege appointment of executors, as in Form 1767, and conclude as in other cases.*]

1783. Order thereon.

[*Commencement as in Form 1787.*]

ORDERED, that plaintiff have leave to proceed against C.... D...., the executor of said Y.... Z...., deceased, by the service of summons and complaint upon him as the defendant herein; and that the proceedings by attachment stand revived and continued in the name of said executor as defendant.

[*In Nebraska the order should be conditional. See Form 1768.*]

1784. Stipulation in action against corporation, on the expiration of its charter, to continue in the name of new corporation.

[*Title.*]

The act of incorporation by which the defendants, the president, directors, and company of the Bank of A...., were incorporated, having expired by its own limitation since this action was commenced, and the Bank of A.... having succeeded to the rights and liabilities of the defendants touching the subject-matter of this action:

It is therefore stipulated that the action be continued against the Bank of A...., without prejudice to the rights of either party on the merits, and that an order of the court may at any time be entered by either party to this effect.

[*Date.*]

[*Signatures.*]

1785. Notice of motion to substitute officer's successor.

[Title.]

Please take notice that on the affidavit of A.... B...., of which a copy is herewith served, the undersigned will move the court, at a special term thereof to be held at, on the day of, 19.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, to substitute W.... X...., supervisor of the town of [*or other official designation*] in the place of Y.... Z...., as plaintiff [*or, defendant*] in this action; or for such other relief as may be just.

[Date.]

[Signature.]

[Address.]

1786. Affidavit therefor.

[Title.]

[Venue.]

M.... N...., being duly sworn, says that he is the attorney of the plaintiff [*or defendant*] in this action; that on the day of last, W.... X...., of, was duly elected [*or appointed*] to the office of of the [town of in the] county of, in place of the [defendant Y.... Z....]; and that on the day of last, the said W.... X.... entered upon the duties of said office, and still holds the same.

[Signature.]

[Jurat.]

1787. Order thereon.

[Title.]

[At a special term, etc.]

On reading and filing the affidavit of M.... N.... [and proof of due service of notice] and on motion of M.... N...., after hearing O.... P.... [*or, no one appearing*] in opposition:

ORDERED, that W.... X...., of [*designating official character*], be substituted as the [defendant] herein, in place of Y.... Z.... [and he is hereby required to appear and answer within days after service of a copy of this order].

CHAPTER CXXVII.

ADDITIONAL PARTIES, INTERVENTION AND INTERPLEADER UNDER THE STATUTES.

- | | |
|---|---|
| 1788. Order by court, of its own motion, bringing in necessary parties. | 1794. Order granting motion for intervention. |
| 1789. Petition by landlord to intervene in ejectment against tenant. | 1795. Petition for intervention in replevin (Iowa). |
| 1790. Petition by owner of chattels to intervene in replevin. | 1796. Notice of motion for interpleader. |
| 1791. Petition by judgment creditor to be made co-plaintiff in creditor's action. | 1797. Affidavit by defendant, for interpleader of third person in action on contract. |
| 1792. Notice of motion for intervention. | 1798. The same, in action of replevin. |
| 1793. Order to show cause why petition for intervention should not be granted. | 1799. The same, where the third party claims a part only of the property. |
| | 1800. Order of interpleader. |
| | 1801. Another form, delivery of specific property, and appointing receiver therefor. |

Ample provisions are generally made in the codes of the various states for bringing in new parties in actions already pending. When it is necessary for a complete determination of a controversy that other parties be brought in, they may be brought in by the court of its own motion, or upon motion of any of the parties to the action.

In ejectment and replevin any person having an interest in the subject matter may himself petition to be made a party on a showing by affidavit or petition, and will be let in as a party if his showing be sufficient. The same relief may be had in any action by a third party who shows that he has such interest in the subject matter as to require that he be made a party for his own protection, or that a complete determination of the controversy cannot be had without his presence. This proceeding is properly called *intervention*.

In actions on contract, or to recover specific real or personal property or its value, when a third person makes demand for the same debt or property the defendant may, on a showing of the facts, have such third party brought in to contest the plaintiff's claim. By some statutes a garnishee may invoke this relief.

This proceeding is a statutory *interpleader*, and performs the function of the equity bill of interpleader, and ordinarily takes its place. *McDonald v. Allen*, 37 Wis. 108.

In a foreclosure action, after judgment and before sale, the plaintiff may bring in a necessary or proper party for the purpose of barring his rights by the judgment. Wis. Stats. 1898 sec. 3161.

See generally on this subject: Wis. Stats. 1898 secs. 2610, 2611, 2767; Minn. Rev. Laws 1905 secs. 4069, 4070, 4138-4140; Iowa Code secs. 3594-3596; N. Dak. Rev. Codes secs. 5238-5240; S. Dak. Rev. Codes C. P. secs. 95-98; Cobbe's Ann. Stats. of Nebr. secs. 1044 *et seq.*

1788. Order by court, of its own motion, bringing in necessary parties.

[*Title.*]

[*Caption.*]

This action having come on for trial at said term on the day of, 19.., before the court, E.... F.... appearing for the plaintiff, and G.... H.... for the defendant, and it appearing to the court that L.... M.... and N.... O.... are necessary parties defendant in this action, without whose presence therein a complete determination of the controversy can not be had; and that they have such an interest in the subject-matter of the controversy that the court should require them to be made parties for their due protection:

ORDERED, That said L.... M.... and N.... O.... be made parties defendant to this action, and that the summons and complaint be amended by the addition of said L.... M.... and N.... O.... as defendants, and otherwise as the plaintiff may be advised. That within twenty days from the date hereof, the plaintiff cause said amended summons and complaint to be served on said defendants hereby brought in, and that they and each of them have twenty days, after such service, in which to answer said amended complaint. That the trial herein be postponed until the action is ready for trial against said defendants hereby brought in.

By the Court:

J.... K...., Judge.

1789. Petition by landlord to intervene in ejectment against tenant.

[*Title.*]

To the Circuit Court for County.

THE PETITION of L.... M...., of in said county, respectfully represents:

I. That the action above entitled is now pending in this court,

for the recovery by said plaintiff from the defendant of the following described real estate and premises, situate in said county, to-wit [*describe same*] which action has not proceeded to judgment [but is at issue], [*or, and the time for answering the complaint therein has not yet expired*].

II. That said defendant C.... D.... occupies said premises as tenant of your petitioner, and not otherwise.

III. That your petitioner is the owner in fee-simple of said premises, and the whole thereof, having acquired title thereto by [*here indicate the source of title*], and that the plaintiff in said action has no interest, right of possession or title in the said premises.

WHEREFORE your petitioner prays that he be allowed to come in as a party defendant to defend this action; and that all proceedings be stayed in said action [on the part of either party] until a hearing can be had upon this petition.

L.... M....,
Petitioner.

[*Verification as in Form 1766.*]

1790. Petition by owner of chattels to intervene in replevin.

[*Title.*]

To the court of county.

THE PETITION of L.... M.... respectfully represents:

I. That the above entitled action is now pending in this court for the recovery of the possession of certain personal property, to-wit [*description of property*]; which action has not, as deponent is informed and believes, proceeded to judgment.

II. That the defendant received the said [*property*] from this deponent for storage, and this deponent is the sole owner thereof.

III. That the claim of the plaintiff in this action is made adversely to deponent's title, and deponent desires to litigate the question directly with him.

WHEREFORE, etc. [*as in last preceding form.*]

L.... M....,
Petitioner.

[*Verification as in Form 1766.*]

1791. Petition by judgment-creditor to be made co-plaintiff in creditor's action.

[*Title.*]

To the court for county.

THE PETITION of L.... M...., of in said state, respectfully represents:

I. That this action was brought by the above named plaintiff as a judgment creditor of the above named defendant C....

D...., to reach the property of said C.... D...., alleged to have been fraudulently conveyed to the said defendants, G.... H.... and E.... F...., and to set aside the conveyances and transfer as fraudulent and void as against creditors of the said C.... D....

II. That your petitioner is a judgment creditor of said defendant C.... D...., having duly recovered a judgment against him in the court for county, on the day of, 19.., for the sum of dollars damages, and dollars costs, in all dollars, which judgment remains in full force and unappealed from, and that there is now due and unpaid thereon the sum of dollars with interest from said day of rendition.

III. That on the day of, 19.., execution was duly issued on the said judgment, to the sheriff of county, commanding him to satisfy said judgment out of the personal property of the said defendant C.... D...., and if sufficient personal property could not be found, then out of the real property belonging to the said defendant, on the day when said judgment was docketed, in said county, to-wit, the day of, 19.., or at any time thereafter, which said execution was afterwards, on the day of, 19.., returned by said sheriff wholly unsatisfied.

IV. That your petitioner is ready and willing to contribute to the expense of the action on being let in as a party co-plaintiff, and that [*here state any special circumstances that render it necessary or desirable that the petitioner be let in, if any exist.*]

YOUR PETITIONER therefore prays that he be allowed to come in as a party plaintiff in this action [and to prosecute the same]; and for such further relief as may be just.

L.... M....,
Petitioner.

[*Verification as in Form 1766.*]

1792. Notice of motion for intervention.

[*Title.*]

TAKE NOTICE, that on the annexed petition and on the pleadings in this action, the undersigned will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for an order directing L.... M.... the petitioner above named, to be made a party defendant in the action now pending in this court between A.... B...., plaintiff,

and Y.... Z...., defendant, and for such other relief as may be just.

[Date.]

E.... F....,

[Address.]

Attorney for Petitioner.

1793. Order to show cause why petition for intervention should not be granted.

[Title.]

[Caption.]

On reading and filing the petition of L.... M.... of praying to be let in as a party defendant in this action.

IT IS ORDERED that the plaintiff [and defendant] herein show cause, on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, why the prayer of said petitioner should not be granted.

Further ordered that until the determination of this motion all proceedings herein on the part of the plaintiff [and defendant] be stayed.

And let copies of this order and said petition be served on the attorneys of the plaintiff and defendant respectively, at least days before the hearing of such motion.

By the Court:

J.... K...., Circuit Judge.

1794. Order granting motion for intervention.

[Title of the cause.]

[At a special term, etc.]

On reading and filing the petition of L.... M.... dated the day of, 19.. [and proof of due service of notice of this motion], and on motion of O.... P.... for said C.... D...., and after hearing Q.... R.... [or no one appearing] in opposition:

ORDERED that C.... D.... be made a party defendant herein, and that the summons and complaint be amended accordingly [and that plaintiff have leave to amend them in other respects as he may be advised]; and that within days after service of a copy of this order on the plaintiff's attorney, the plaintiff cause said amended summons and complaint to be served on said L.... M.... and that said L.... M.... have twenty days after such service in which to answer said complaint, and that this cause thereupon proceed as if said L.... M.... had been originally made a defendant therein. Let all proceedings on the part of the plaintiff be stayed until said answer be served or the time herein fixed for the service thereof shall have expired.

By the Court:

J.... K...., Judge.

1795. Petition for intervention in replevin (Iowa).

[Title.]

To the court of the county of

THE PETITION of L.... M.... respectfully shows to the court:

[Here state facts showing nature of the action, and its present condition, as well as the facts showing the interest or ownership of the petitioner, as would be done in a complaint.]

WHEREFORE your petitioner asks leave to intervene in this action as against both plaintiff and defendant therein [*or as the case may be*], and he demands judgment against both plaintiff and defendant [*or as the case may be*], for the property described in this petition of intervention and in the petition of the plaintiff in said action [*or for the possession of the same, as the case may be*] or for the value thereof if the same can not be found, and for his damages and costs.

O.... P....,

Attorney for Intervener.

[Verification.]

*[In Iowa this petition becomes the pleading of the intervener and is to be answered as other pleadings.]***1796. Notice of motion for interpleader.**

[Title.]

Take notice, that on the petition of C.... D.... herewith served, and on the complaint herein, the defendant will move the court, at a special term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, to substitute O.... P.... of in his place, as defendant herein, and to discharge this defendant from liability to either the plaintiff or to the said O.... P.... concerning the agreement [*or otherwise designate the contract*] mentioned in the complaint, upon this defendant's paying into court the sum of dollars, the amount claimed in the summons herein [*or, if action is for specific property, say: concerning the property mentioned in the complaint, upon said defendant's transferring the same to such person as the court may direct*]; or for such other relief as may be just [and for the costs of this motion].

[Date.]

N.... O....,

Defendant's Attorney.

[Address.]

1797. Affidavit by defendant, for interpleader of third person in action on contract.

[*Title.*]

[*Venue.*]

C.... D...., being duly sworn, says:

I. That he is the defendant in the above entitled action.*

II. That the same is brought on a contract, which is set forth in the complaint, and that the time for answering said complaint has not expired, and the defendant has not yet answered in this action.

III. That one [*name the claimant*], who is not a party to this action, makes a demand against the defendant for the same debt for which this action is brought, which demand is made without any collusion with the defendant.

IV. That on the day of, 19..., said [*name claimant*] served on the defendant a notice and demand of which a true copy is hereto annexed.

V. That the defendant is unacquainted with the rights of the respective claimants, and does not know to whom to pay the amount due upon said contract set forth in the complaint.

THE DEFENDANT therefore prays for an order substituting said [*claimant*] as defendant in this action, and discharging the defendant from liability to either party on his depositing in court the amount of said debt, which deposit he hereby offers to make.

C.... D....

[*Jurat.*]

1798. The same, in action of replevin.

[*Proceed as in last preceding form to the *.*]

II. That the same is brought to recover from the defendant the following described personal property, to-wit [*describe same*].

III. That the complaint herein was served on the day of, 19..., and the time for answering has not yet expired, and the defendant has not yet answered the same.**

IV. That one [*name claimant*] who is not a party to this action, makes a demand against the defendant for the whole of the same property, the possession of which this action is brought to recover.

V. That the said demand is made without collusion with the defendant and [*here allege any facts, as to possession, showing that the defendants are not liable for any damages for detention, or otherwise, according to facts of case*].

VI. That the defendant does not know the rights of the respective claimants, nor to whom said property should be delivered.

DEFENDANT therefore prays the court to substitute said [claimant] as defendant herein, and to discharge this defendant from all liability to either party so claiming, upon his delivering the said property, or its value, to such persons as the court may order, which he hereby offers to do.

C.... D....

[*Jurat.*]

1799. The same, where the third party claims a part only of the property.

[*Proceed as in last preceding form to the **.*]

IV. That a part of said property, to-wit [*here describe the part*], is claimed by one [*name claimant*] who has notified the defendant that he owns and is entitled to the possession of such part, and demands the same of this defendant [as by the written notice and demand of which a true copy is hereto annexed, will more fully appear].

V. That the defendant is ignorant of the rights and merits of the respective claims of said plaintiff and said [claimant] and that a complete determination of the questions in controversy can not be had without the presence of said [claimant] as a party to this action [and that, as to the property so claimed by said claimant, this defendant makes no claim].

VI. That all said property has been taken from the possession of this defendant by the sheriff of county, upon the requisition of the plaintiff in this action.

WHEREFORE, etc.

C.... D....

[*Jurat.*]

1800. Order of interpleader.

[*Commencement and recitals as in Form 1788.*]

ORDERED that on payment by the defendant to the clerk of this court of the amount claimed in the summons herein, principal and interest, less ten dollars costs of this motion, within five days from the entry of this order, O.... P.... be substituted as defendant in this action in place of Y.... Z...., the defendant above named, and that said Y.... Z.... thereupon be discharged from liability to either the plaintiff above named or said O.... P....

And further ordered that the said O.... P.... have leave to appear and defend this action within twenty days after service

upon him of a copy of this order, together with a copy of the complaint herein, and that in case he fail so to do the plaintiff may apply to the court for judgment as by default, and for such other relief as he may be entitled to.

By the Court:

J.... K...., Judge.

1801. Another form, delivery of specific property, and appointing receiver therefor.

[Commencement and recitals as in last preceding form.]

ORDERED: 1. That the defendant deliver the property mentioned in the complaint herein to R.... S...., Esq., of, who is hereby appointed receiver thereof.

2. That O.... P...., of be substituted as defendant in this action, in place of the above named Y.... Z....; who shall, upon delivery of the said property to the said receiver, be discharged from all liability therefor, either to the plaintiff or to the said O.... P....

3. That the said receiver hold the said property, subject to the further direction of this court. *[If any special authority is needed, as for the collection of incomes, or the sale of the property, insert it here].*

4. That within days after entry [*or notice*] of this order, the plaintiff serve a summons and a copy of his complaint, amended as he may see fit [*with a copy of this order*], upon the said O.... P....; and that the said O.... P.... answer such complaint within days thereafter.

5. That if the plaintiff neglect to serve his summons and complaint and this order as herein directed, the defendant Y.... Z.... may apply to the court for an order dismissing the action, and that the said property be delivered by the receiver to the said defendant Y.... Z....; and if the said O.... P.... neglect to answer such complaint, if served as herein directed, the plaintiff may apply, on notice, for an order that said property be delivered by the receiver to the plaintiff.

That dollars costs be allowed to the said Y.... Z...., to be deducted by him out of the fund [*or, to be paid by the plaintiff, and allowed to him in case of his final recovery of judgment*].

By the Court:

J.... K...., Judge.

CHAPTER CXXVIII.

CHANGE OF VENUE.

- | | |
|--|--|
| 1802. Demand for change by party because action is not brought in the county in which defendant resides. | 1811. Affidavit for change in case appealed from justice court (Wisconsin). |
| 1803. The same, by defendant's attorney, combined with notice of retainer. | 1812. Affidavit for change of venue on ground of prejudice of judge. |
| 1804. The same, specifying other reasons than residence. | 1813. Order changing venue. |
| 1805. Consent to change. | 1814. Stipulation to change place of trial (Wisconsin). |
| 1806. Affidavit for change on failure to consent. | 1815. Order changing venue on stipulation. |
| 1807. Notice of motion for change. | 1816. Order changing venue for alleged prejudice of judge (Wisconsin). |
| 1808. Order to show cause with stay of proceedings. | 1817. Order changing venue, on judge's own motion. |
| 1809. Affidavit for change because impartial trial cannot be had. | 1818. Affidavit by plaintiff to oppose change asked for on ground of convenience of witnesses. |
| 1810. Affidavit for change for convenience of witnesses. | |

Proceedings to change the place of trial of pending actions are purely statutory, and the statutes of the various states vary considerably as to the grounds upon which an application for such change may be made. Most of the statutes agree substantially in providing that such change may be had when it appears either (1) that the county in which the action is brought is not the county fixed by statute for the trial of such an action; (2) where it appears that an impartial trial cannot be had therein; (3) when the convenience of witnesses and the ends of justice would be promoted by a change. Wis. Stats. 1898 secs. 2622, 2624; Minn. Rev. Laws 1905 secs. 4096, 4097, 4099, 4100; N. Dak. Rev. Codes sec. 5244; S. Dak. Rev. Codes C. P. sec. 102.

Iowa provides for such a change (1) when the action is brought in the wrong county; (2) when the county where a jury action is brought is a party thereto; (3) when the trial judge is a party, or directly interested or connected by blood or affinity with an interested party; (4) when it appears by proper affidavit that the inhabitants of the county or the judge is so preju-

diced, or the adverse party or his attorney has such undue influence over the inhabitants of the county that a fair trial cannot be had; (5) when the parties agree in writing for a change; (6) when it appears that a jury cannot be obtained in the county. Iowa Code secs. 3504, 3505.

In Nebraska the court may grant a change where it appears that a fair trial cannot be had, or the judge is interested, or related to either party, or he has been of counsel or is otherwise disqualified to sit. Cobbey's Ann. Stats. of Nebr. sec. 1060.

In Wisconsin, in addition to the general cases first above named, change may be had in any case on stipulation of the parties in writing, also in any civil case brought in the name of the state where the jury has disagreed or rendered a verdict which has been set aside by the court on certain grounds (Wis. Stats. 1898 sec. 2622); also when the judge is a party, or interested in the action, or is related to or has been of counsel for either party (Wis. Stats. 1898 sec. 2623); also upon affidavit by the party, of prejudice of the judge (Id. sec. 2625).

In Minnesota a change may also be had upon written consent of the parties. Minn. Rev. Laws 1905 secs. 4096, 4097.

The forms given in this chapter are designed for use in Wisconsin; they may, however, be easily varied to meet the requirements of the statute of any of the other code states.

1802. Demand for change by party because action is not brought in the county in which defendant resides.

[*Title of cause.*]

I hereby demand that the trial of this action be had within the proper county, viz., the county of [*designating it*] for the reason that at the time of the commencement of this action I resided and still reside in the city of in said county of

.....

[*Date.*]

C.... D....,

Defendant above named.

[*Address.*]

[*This must be served within twenty days after the service of the complaint.*]

1803. The same, by defendant's attorney, combined with notice of retainer.

[*Title.*]

Take notice that the undersigned is retained by and hereby appears for the defendant in the above entitled action; and that the defendant demands that the trial of this action be had within the county of for the reason that * the said de-

defendant at the time of the commencement of this action, resided and still resides in the city of in said county of
[Date.]

G.... H....
Defendant's Attorney.
[P. O. address.]

[Address.]

1804. The same specifying other reasons than residence.

[Proceed as in either of two preceding forms to the * and continue]: the said action is brought for the recovery of certain real property none of which is situated within the county of [name county in which action is brought] but all [or a part] of which is situated within the county of [name proper county].

[In case the reason for the change be other than that above named, specify it, following the particular statute closely.]
[Date.]

G.... H....
Defendant's Attorney.
[P. O. address.]

[Address.]

1805. Consent to change.

[Title.]

Take notice that the above named plaintiff consents that the place of trial of this action be changed to county.
[Date.]

E.... F....,
Plaintiff's Attorney.
[P. O. Address.]

[Address.]

[To be served within five days after demand.]

1806. Affidavit for change on failure to consent.

[Title.]

[Venue.]

C.... D...., being duly sworn on oath, says that he is the defendant [or one of the attorneys of the defendant] in the above entitled action.

That the same was commenced on the day of, 19.., by service of the summons and complaint on said defendant.

That at the time of the commencement of this action, the said defendant resided and still resides in the city of in the county of

That on the day of, 19.., the defendant's attorneys served on the attorneys for the plaintiff, a demand in writing that the place of trial of this action be changed to county, of which demand a copy is hereto annexed.

That no written consent to said change has been served by the plaintiff's attorneys on the defendant's attorneys, or received by them in this action.

C.... D....

1807. Notice of motion for change.

[*Title.*]

Take notice that upon the summons and complaint in this action, the demand for change of place of trial heretofore served on you, and the affidavit of C.... D...., herewith served on you, the undersigned will move the court at the next regular term thereof to be held in the court house in the city of in said county, on the day of, 19.., at the opening of court on said day or as soon thereafter as counsel can be heard [*or if the motion be before the judge*] will apply to the Hon. L.... M...., circuit judge, at his chambers in the court house in the city of in said county, on the day of, 19.., at ... o'clock A. M.] for an order changing the place of trial of this action to county, with costs of motion.

[*Date.*]

G.... H....,
Defendant's Attorney.

[*Address.*]

1808. Order to show cause with stay of proceedings.

[*Title.*]

On the affidavit of C.... D.... served herewith, and the demand therein mentioned, and on the pleadings, let the plaintiff show cause at a term to be held at on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, why the place of trial of this action should not be changed from the county of to the county of; and why the defendant should not have the costs of this motion, and such other relief as may be just. And until the determination of this motion, let all the proceedings on the part of the plaintiff be stayed.

Let this order and said affidavit be served on the plaintiff's attorney on or before the day of, 19..

By the Court:

L.... M...., Circuit Judge.

1809. Affidavit for change because impartial trial cannot be had.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action.

That the summons and complaint in this action were served on him on the ... day of, 19..; and that issue was joined by the service of this defendant's answer on the day of, 19..

That this affiant has fully and fairly stated the case in this action to G.... H...., Esq., his counsel, who resides in the city of in said county, and that upon such statement thus made he is advised by his said counsel and verily believes that he has a valid and substantial defense to said action upon the merits, and to the whole thereof [*or to some part thereof, specifying what part*].

That an impartial trial cannot be had in the county in which this action is pending, as this affiant has reason to believe and verily does believe; and that the reasons and grounds of this belief are as follows, to wit [*here state the reasons why an impartial trial cannot be had, with particularity; if there be widespread prejudice of the people not only should the fact be stated but it must appear that the affiant has occasion to know that such is the fact by investigation, and the affidavits of third persons who have mixed with the people and are able to testify from personal knowledge should be added. The affidavit of the party himself will rarely suffice.*]

C.... D....

[*Jurat.*]

1810. Affidavit for change for convenience of witnesses.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action, and that the same was commenced on the day of, 19.., by the service of the summons and complaint; and that issue was joined therein by service of defendant's answer on the day of, 19..

That this affiant has fully and fairly stated the case in this action to G.... H...., Esq., his counsel, who resides at in said county; and that upon such statement thus made he is advised by his said counsel and verily believes that he has a valid defense to said action upon the merits, and to the whole thereof [*or to a part thereof, specifying what part*].

That the facts which the defendant expects to prove to establish his defense are the following [*here state the same*].

That this affiant has fully and fairly stated to his said counsel the facts which he expects to prove by each and every one of the following named witnesses, viz. [*name proposed witnesses*]; and that he is advised by said counsel and verily believes that

each and every one of said witnesses are material and necessary to his defense, and that without their testimony he can not safely proceed to trial; and that each and all of said witnesses reside in the county of, to-wit [*here specify where each witness resides*].

That the convenience of said witnesses requires that the place of trial of this action be changed to said county of, and this affiant makes this affidavit for the purpose of moving for such change.

That no previous application for change of place of trial herein has been made, and no change has heretofore been made.

C.... D....

[*Jurat.*]

1811. Affidavit for change in case appealed from justice court (Wis. Stats. 1898 sec. 2624).

[*Venue.*]

C.... D...., being first duly sworn, says:

That he is defendant in the above entitled action, and that the same is now pending on appeal of this defendant from a judgment rendered in said action, before J.... P...., Esq., a justice of the peace of said county, on the day of, 19.., in favor of the plaintiff and against this defendant, for the sum of dollars and cents, damages, and dollars and cents costs [*or otherwise describe judgment*].

That this action was commenced by process personally served on affiant on the day of, 19.., and that the affiant was not then a resident of said county, but then resided and ever since has resided and now resides in the county of; and defendant demands a change of the place of trial to said county of, the county of his residence.

C.... D....

[*Jurat.*]

1812. Affidavit for change of venue on ground of prejudice of judge.

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in this action; and that he has good reason to believe and does believe that he cannot have a fair trial in such action in said court on account of the prejudice of the judge thereof, the Hon. L.... M....; and the defendant makes this affidavit

for the purpose of applying for a change of the place of trial to some county where the cause complained of does not exist.

C.... D....

[*Jurat.*]

[*This affidavit may be filed at any time before the trial begins, but notice of the motion should be given if it is desired to avoid payment of witness fees.*]

1813. Order changing venue.

[*Title.*]

[*Caption.*]

On reading and filing the affidavit of [*here name all affidavits and papers on which motion is based*], and on the pleadings herein, and after hearing G.... H...., Esq., of counsel for the defendant, and E.... F...., Esq., of counsel for the plaintiff, due proof of service of notice of this motion [*or the order to show cause why this motion should not be granted*] having been made and filed; and the court being advised in the premises,

ORDERED that the place of trial of this action, be and hereby is changed from county to the county of which is the proper place of trial of the same [*or, on the ground that there is reason to believe that an impartial trial can not be had in said county of; or, for the reason that the convenience of witnesses and the ends of justice will be promoted by such change*] [*and that the defendant have ten dollars, the costs of this motion*].

By the Court:

J.... K...., Circuit Judge.

1814. Stipulation to change place of trial (Wis. Stats. 1898 sec. 2622).

[*Title.*]

It is hereby stipulated and agreed that the place of trial of this action be changed to county [*and that the plaintiff advance the costs of making such change, to abide the event of the action*].

[*Date.*]

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

1815. Order changing venue on stipulation.

[*Title.*]

[*Caption.*]

The parties hereto having stipulated that the place of trial of this action be changed from county to county,

ORDERED that the place of trial of this action be changed

in accordance with said stipulation, from county to county.

By the Court:

J.... K...., Circuit Judge.

1816. Order changing venue for alleged prejudice of judge
(Wis. Stats. 1898 sec. 2625 as amended by Laws 1905 c. 282).

[*Title.*]

[*Caption.*]

On the affidavit of the defendant, C.... D...., alleging that he has good reason to believe and does believe that he cannot have a fair trial in this action in this court, on account of the prejudice of the judge thereof, the Hon. [*name the judge*], and on motion of G.... H...., Esq., defendant's attorney,

ORDERED that the place of trial of this action be and hereby is changed from county to the county of

[*Date.*]

By the Court:

L.... M...., Circuit Judge.

1817. Order changing venue, on judge's own motion.

[*Title.*]

[*Caption.*]

This cause being now pending in this court at issue, and it appearing to the judge thereof, that he has been of counsel for one of the parties thereto [*or, that he is interested in the subject matter thereof, or, that he is related to one of the parties*], therefore,

ORDERED that the place of trial of this action be changed from county to county.

[*Date.*]

By the Court:

L.... M...., Circuit Judge.

1818. Affidavit by plaintiff to oppose change asked for on ground of convenience of witnesses.

[*Title.*]

[*Venue.*]

A.... B...., plaintiff above named, being duly sworn, says:

That he has fully and fairly stated to M.... N...., his counsel in this cause, who resides at, in the county of, the facts which he expects to prove by each and every one of the following witnesses, viz., C.... D...., of the town of [*etc., naming all the witnesses*], all of whom reside in said county of; and that they are, each and every one of them, material and necessary witnesses for this plaintiff on the

trial of this cause, as he is advised by his said counsel, and verily believes; and that without the testimony of each and every one of said witnesses, this plaintiff cannot safely proceed to the trial of this cause, as he is also advised by his said counsel, and verily believes.

That the facts which this plaintiff expects to prove by said witnesses, are as follows [*state in detail the facts and circumstances which the plaintiff expects to prove by each witness, naming him, and showing their materiality*].

A.... B....

[*Jurat.*]

CHAPTER CXXIX.

CONSOLIDATION OF ACTIONS.

- | | |
|---|--|
| 1819. Affidavit for consolidation of actions. | 1820. Notice of motion to consolidate actions. |
| | 1821. Order consolidating actions. |

When two or more actions are pending in the same court which might have been joined they may be consolidated on motion, in the discretion of the court. Wis. Stats. 1898 sec. 2792; Minn. Rev. Laws 1905 sec. 4141; Iowa Code sec. 3644; N. Dak. Rev. Codes sec. 5738; S. Dak. Rev. Codes C. P. sec. 567; Cobbe's Ann. Stats. of Nebr. sec. 1150.

In order to justify consolidation it must appear either by the pleadings or affidavits, or both, that the actions are of such nature that they might have been joined under the provisions of the statute, and that either no defense is intended or that substantially the same defenses and questions are involved in both actions.

1819. Affidavit for consolidation of actions.

[Give titles, separately, of the various causes.]

[Venue.]

C.... D...., being duly sworn, says that he is the defendant *[or one of the defendants] [or if action be against a corporation: president of the corporation defendant]* in each and all of the above entitled actions, which are all pending in the court aforesaid; that each of said actions is founded upon a promissory note alleged to have been made by defendant and owned by the plaintiff *[or otherwise state the nature of the various actions so as to show that they are all of a class which the statute permits to be joined]*.

That the defendant has no defense to said actions and does not intend to defend the same *[or that the defenses are identical in all of said actions, namely: stating briefly the defenses, as: that the said notes were executed by defendant to plaintiff under duress, as more fully set forth in the answer of the defendant, a copy of which is hereto attached, and that the issues which will arise and be tried are the same in all of said actions, or other-*

wise state the nature and identity of the defenses, according to the fact].

[State whether causes are at issue, and if so when issue was joined, and if plaintiff has refused to consent to consolidation, state the fact].

C.... D....

[*Jurat.*]

1820. Notice of motion to consolidate actions.

[*Give titles of all the actions separately.*]

TAKE NOTICE that upon the affidavit of C.... D...., herewith served, and upon the pleadings heretofore filed and served in the above entitled actions, the defendant will move the court at a term thereof, to be held at the court house in the city of in said county, on the day of next, at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order consolidating the two above entitled actions into one, with costs of motion.

[*Date.*]

G.... H....

Defendant's Attorney.

[*Address.*]

1821. Order consolidating actions.

STATE OF

..... Court County.

A.... B...., Plaintiff, vs. C.... D...., Defendant.

Action commenced
....., 19..

A.... B...., Plaintiff, vs. C.... D...., Defendant.

Action commenced
....., 19..

The motion of the defendant for the consolidation of the two actions above entitled into one, coming on to be heard at said term, upon the affidavit of C.... D...., and the pleadings in said actions, and the court having heard G.... H...., Esq., attorney for defendant, and E.... F...., Esq., attorney for

the plaintiff, respectively, for and against the motion, and being advised in the premises:

IT IS ORDERED that the said actions be and they are hereby consolidated into one action, and that the several statements of the causes of action in the respective complaints stand as the complaint in said consolidated action, and the answers already served stand as the answer thereto; and that the defendant have and recover ten dollars costs of motion.

[*Date.*]

By the Court:

L.... M...., Judge.

CHAPTER CXXX.

OFFERS OF JUDGMENT AND TO LIQUIDATE DAMAGES.

1822. Offer to allow judgment.	1825. Judgment thereon.
1823. Notice of acceptance there- of.	1826. Offer to liquidate damages (served with answer)
1824. Affidavit to enter judgment thereon.	1826a. Notice of acceptance.

The codes quite generally provide that the defendant may at any time before the trial serve on the plaintiff an offer to permit judgment to be taken by the plaintiff for the sum, or property, or to the effect therein specified, with costs, and if the offer be not accepted within a specified time it is deemed withdrawn; but if the plaintiff fail to recover a more favorable judgment he cannot recover costs from the time of the offer. Wis. Stats. 1898 sec. 2789; Minn. Rev. Laws 1905 sec. 4196; N. Dak. Rev. Codes sec. 5639; S. Dak. Rev. Codes C. P. sec. 472. In Iowa and Nebraska this offer is limited to an action for the recovery of money only. Iowa Code sec. 3819; Cobbey's Ann. Stats. of Nebr. sec. 1575. In Nebraska an offer to confess judgment may also be made before or after action is brought. Cobbey's Ann. Stats. of Nebr. secs. 1570, 1575. In North Dakota and South Dakota the plaintiff may make an offer of judgment when a counter-claim is interposed. N. Dak. Rev. Codes sec. 5640; S. Dak. Rev. Codes C. P. sec. 473. In certain states an offer to allow damages to be assessed at a certain sum may also be made with like effect. In Wisconsin, North Dakota and South Dakota this privilege is limited to actions upon contract, and the offer must be served with the answer. Wis. Stats. 1898 sec. 2790; N. Dak. Rev. Codes sec. 5641; S. Dak. Rev. Codes C. P. sec. 474. In Iowa it may be made in all actions for the recovery of money only (Iowa Code sec. 3820), and may be served after answer. In Minnesota, in tort actions, there must be an actual tender. Minn. Rev. Laws 1905 sec. 4197.

1822. Offer to allow judgment.

[*Title.*]

The defendant [*naming him, or them*], offers to allow judgment to be taken against him [*or, against the defendant herein*]

by the plaintiff, for [*here specify the sum or property, or specific relief intended*] with costs.

[*Date.*]

[*Signature of defendant or his attorney.*]

[*Address to plaintiff's attorney.*]

1823. Notice of acceptance thereof.

[*Title.*]

Take notice that the plaintiff accepts the offer of the defendant dated, 19.., allowing him to take judgment in this action [for dollars] with costs.

[*Date.*]

[*Signature of plaintiff's attorney.*]

[*Address to defendant's attorney.*]

1824. Affidavit to enter judgment thereon.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff in the above entitled action, and that the annexed offer to allow judgment, made by the defendant, was served on him on the day of last; and that within ten days thereafter, to-wit, on the day of last, he served upon the defendant's attorney, G.... H...., Esq., the foregoing notice that plaintiff accepted the same, by delivering to and leaving with said G.... H.... personally a true copy of the said last named notice, at the office of the said G.... H.... in the city of, county of aforesaid.

E.... F....

[*Jurat.*]

1825. Judgment thereon.

[*Title.*]

This action having been commenced by due personal service of summons on the defendant C.... D...., on the day of, 19.., and the said defendant L.... M.... having appeared, and said defendants having offered in writing to allow the plaintiff to take judgment against them for [*state the judgment offered*], which offer the plaintiff, within ten days thereafter, duly accepted in writing; now, on motion of M.... N...., plaintiff's counsel:

IT IS ADJUDGED that said plaintiff recover of said defendants dollars [*or other relief, according to the offer*],

with dollars costs and disbursements, making together the sum of dollars.

Dated, 19..

By the Court:

N.... O...., Clerk.

[If the statute require entry of judgment by the court, the requirement must be followed.]

1826. Offer to liquidate damages (served with answer).

[Title.]

The defendant hereby offers that if he fail in his defense in this action the plaintiff's damages be assessed at the sum of dollars.

[Signature of the defendant, or his attorney.]

[Address to plaintiff's attorney.]

1826a. Notice of acceptance thereof.

[Title of cause.]

Take notice that the plaintiff hereby accepts the offer of the defendant, that if he fail in his defense in this action, the damages of the plaintiff be assessed at the sum of dollars.

[Date.]

[Signature of plaintiff's attorney.]

[Address to defendant's attorney.]

PART V.

FORMS RESPECTING TRIAL AND EVIDENCE.

1119

CHAPTER CXXXI.

PROCEEDINGS TO OBTAIN INSPECTION OF PRIVATE WRITINGS OR ADMISSION OF GENUINENESS.

- | | |
|--|--|
| <p>1827. Petition for inspection and copies.</p> <p>1828. Order for inspection and copies, or to show cause.</p> <p>1829. Order absolute, for inspection and copies, after decision of motion upon order to show cause.</p> <p>1830. Demand for inspection and copy (Nebraska).</p> <p>1831. Petition for production and inspection (Iowa and Nebraska).</p> | <p>1832. Rule thereon (Iowa and Nebraska).</p> <p>1833. Notice requesting admission of genuineness of documentary evidence.</p> <p>1834. Admission thereunder.</p> <p>1835. Stipulation to admit documents.</p> <p>1836. Short form, admission by one party.</p> <p>1837. Stipulation to admit facts.</p> <p>1838. Notice to produce at trial.</p> |
|--|--|

The statutes giving the right to inspection and copies of papers or books in the possession of the opposite party are essentially similar in the various states. Wis. Stats. 1898 sec. 4183; Minn. Rev. Laws 1905 sec. 4729; Iowa Code secs. 4654, 4655; N. Dak. Rev. Codes sec. 5644; S. Dak. Rev. Codes C. P. sec. 477; Cobbe's Ann. Stats. of Nebr. secs. 1379, 1380, 1384, 1385. Certain of the states also have provisions requiring an admission of the genuineness of a writing material to the action when exhibited to the adverse party before the trial, on pain of paying the expense of proving its genuineness. Wis. Stats. 1898 sec. 4184; N. Dak. Rev. Codes sec. 5643; S. Dak. Rev. Codes C. P. sec. 476; Cobbe's Ann. Stats. of Nebr. sec. 1378.

1827. Petition for inspection and copies.

[Title.]

To the court [or, To the Hon. L.... M...., Judge, etc.]

THE PETITION of C.... D.... respectfully shows that he is the defendant in the above entitled action; that this action was commenced on the day of, 19..., by the personal service of the summons and complaint on this defendant, and that the defendant duly answered said complaint on the

.... day of, 19.. [*or otherwise state condition of the action according to the fact*].

That this action is brought by the plaintiff [*here state briefly the nature of the action, e. g.: for money alleged to have been lent by said plaintiff to the said defendant, at his request; or, for money alleged to have been paid by said plaintiff for the use of the said defendant, at his request; or, for money alleged to have been received by the said defendant for the use of said plaintiff*].

That petitioner has fully and fairly stated the case in this action to G.... H...., Esq., his counsel, who resides at, and is advised by his said counsel, upon such statement, and verily believes that an inspection and copies of the following books and papers, and documents, which, as he is informed and believes, are now in the possession of or under the control of the plaintiff, and not of the defendant, are necessary to enable defendant to frame his answer herein [*or, to prepare his case for trial*], and that he cannot safely proceed to trial without such inspection and copies *.

That such inspection and copies are made necessary by the following facts [*here briefly state facts showing necessity and materiality of the books or writings, e. g.: That during the negotiation for, and in making the agreement sued on, deponent wrote to the plaintiff several letters relating thereto, bearing date about the day of, 19..., respectively, which, or some of them, as deponent is informed and believes, constitute said agreement*].

That none of said letters are in the possession or under the control of deponent, nor has he kept any copies of, or extracts from them.

That your petitioner has applied to the said plaintiff for permission to inspect and take a copy of said [*name the documents or the entries in said books relating to said transactions*], which said permission has been refused, and sworn copies of the same have been refused, by said defendants to the plaintiff.

That this is the only application which has been made in this behalf.

YOUR PETITIONER therefore prays that he be allowed to inspect said [*specify what*] and to take a copy thereof; or that a sworn copy [*or copies*] thereof be delivered to him, according to law and the rules and practice of this court, in such time and manner and under such conditions as may seem proper; and for such other or further relief as may be proper.

C.... D....

[*Add verification as in Form 1766.*]

1828. Order for inspection and copies, or to show cause.

[Title.]

Upon the petition of C.... D...., defendant in this action, of which a copy is hereto annexed, and upon the pleadings and proceedings in this action; on motion of G.... H...., Esq., attorney for the defendant,

ORDERED that the plaintiff be required to give to the defendant inspection and a sworn copy of [*name and describe document or book*]; or permission to take such copies in the following mode, namely, that the plaintiff deposit said [*name document or book*] with the clerk of this court in his office in the court house, on the day of, 19.., on or before o'clock noon, such deposit to continue until the day of, 19.., at o'clock noon, during which period the defendant is at liberty to inspect or take such copies. [*Or the order may be: That the plaintiff deliver to the defendant sworn copies of said books and papers, on or before the day of, 19.., at o'clock noon, on condition, nevertheless, that the plaintiff pay or tender to the attorney for the defendant, before such time of delivery dollars, to cover the expense of making such copies and their delivery; or the condition may be: That the plaintiff deposit with the clerk of this court the sum of dollars and notify defendant's attorney of such deposit, out of which the clerk shall tax the reasonable costs and expenses of making and delivering such copies, or such other conditions as the court or judge deems proper.*]

Or, that the said plaintiff show cause to the contrary, before me, at my chambers, in the court house in on the day of, 19.., at o'clock A. M. [*or, before the court at a regular term, on the day of, 19.., at, etc.*]

Let a copy of this order and the petition on which it is founded, be served on the attorneys for said plaintiff days before the date last mentioned.

This order shall operate as a stay of proceedings to this extent only, namely [*here specify how far the proceedings shall be stayed, if it is desired not to make a full stay*].

[Date.]

[By the Court:]

L.... M...., Circuit Judge.

[*The foregoing petition and order are adapted for use in Wisconsin, under Rule XVIII, Circuit Court Rules. In Iowa the petition must state the facts expected to be proved by the books or papers, etc., how and wherein they are material. In Ne-*

braska there must first be a written demand, which if not complied with may be followed by an order: the making of this demand, and the failure to comply should be alleged in the petition.]

1829. Order absolute, for inspection and copies, after decision of motion upon order to show cause.

[This order may substantially follow the form immediately preceding, omitting the provisions requiring the showing of cause. It does not seem necessary to repeat the same.]

1830. Demand for inspection and copy (Nebraska).

[Title.]

Take notice that C.... D.... the defendant above named hereby demands of the plaintiff above named an inspection and copy or permission to take copy of that certain deed [*or other instrument or book, describing the same with such particularity as to enable the other party to distinguish it*], which said [*name instrument or book*] is in the possession and under control of the plaintiff and contains evidence relating to the merits of the defense in this action.

[Date.]

C.... D....

To A.... B...., Esq., Plaintiff,
and E.... F...., Esq., his Attorney.

1831. Petition for production and inspection (Iowa and Nebraska).

*[Follow the first form in this chapter to the * and continue] :* That said deed [*or other paper or book*] is material to the just determination of this action in this, that [*state facts showing its materiality*] and that the defendant expects to prove by said deed [*or other book or paper*] that [*set forth the facts expected to be proved*].

YOUR PETITIONER therefore prays that a rule be issued requiring the plaintiff to produce said deed [*or book*] for the purpose of being inspected and copied by the defendant, and of being used as evidence in his behalf, or that the said plaintiff show cause to the contrary.

C.... D....

[Add verification.]

1832. Rule thereon (Iowa and Nebraska).

The State of to the Sheriff of County,

GREETING: C.... D.... having filed his petition in a certain action pending in the district court of the State of

in and for county, wherein A.... B.... is plaintiff and C.... D.... is defendant, alleging that he believes a certain deed [*or book, describing same as in petition*] is now under the control of said plaintiff, and that the same is material to the just determination of said action.

YOU ARE HEREBY COMMANDED to make known to the said A.... B...., plaintiff aforesaid, that he produce said book [*or paper or deed*] in said court on the day of, 19.., for the purpose of being inspected and copied by the said defendant, or show cause to the contrary.

In witness whereof I have hereunto set my hand and affixed the seal of said court this day of, 19..

[SEAL.]

L.... M...., Clerk.

1833. Notice requesting admission of genuineness of documentary evidence.

[*Title.*]

Take notice that the undersigned proposes to adduce in evidence upon the trial the document [*or the several documents*] hereto annexed and exhibited to you, and that you are requested to give an admission in writing of the genuineness of the same [*respectively*].

[*Date.*]

[*Signature.*]

[*Address.*]

1834. Admission thereunder.

[*Title.*]

I hereby make the admission above requested [*and where a part of several documents are admitted, add: so far as relates to the bond annexed, and refuse to make any other admission*].

[*Date.*]

[*Signature.*]

1835. Stipulation to admit documents.

[*Title.*]

It is hereby stipulated and agreed that the documents hereunder described [and to which we have respectively set our names on the first and last pages thereof] shall and may be admitted and read and used as evidence at the trial of this cause; and that such of the said documents as are described as copies or extracts shall be deemed and taken to be, and shall be used as, true copies or extracts, without further proving the same; and that such copies or extracts shall, and may be, read in evidence as primary and the best evidence, and not as secondary evidence; and that the original documents shall not be required

to be produced, or any evidence as to the same, or of the proper custody thereof, or as to the non-production of the same; and no objection shall be taken to the reading as evidence the documents so marked, saving all just exceptions to the admissibility of the originals as evidence.

The following are the documents above referred to [*describing them, and referring to a figure or letter indorsed*].

[*Date.*]

[*Signatures.*]

1836. Short form; admission by one party.

[*Title.*]

For the purposes of the trial of this action, the due execution by the above-named defendant, and the genuineness of the annexed contract are hereby admitted; and the same may be read in evidence upon the trial of said action, without further proof.

[*Date.*]

[*Signature.*]

Defendant's Attorney.

1837. Stipulation to admit facts.

[*Title.*]

It is hereby stipulated and agreed that the following facts are, and shall be, admitted by both parties for the purpose of, and on, the trial of this action [*here state the facts*].

[*Date.*]

[*Signatures.*]

1838. Notice to produce at trial.

[*Title.*]

TAKE NOTICE that you are hereby required to produce, on the trial of this cause [a certain, *here describe the paper sought; or, if there are several say*], the following described papers:

1. A deed bearing date on or about the day of, 19.., and executed, or purporting to be executed, between M.... N.... and O.... P.... and to convey a farm in the town of

2. All books of account kept by M.... N.... in his business at, from the day of, 19.., to the day of, 19.., and containing entries relating to dealings between M.... N.... and O.... P....

Also other documents, letters, books, papers, and writings whatsoever, in your control, containing any entry, memorandum, or other matter in any wise relating to the matters in question in this cause.

And you are hereby notified that in case of your failure to produce the said [*describing the papers*] the defendant will introduce secondary evidence of their contents on the trial of this action.

[*Date.*]

G.... H....,

[*Address.*]

Attorney for Defendant.

[*The most accurate description possible should be given of all documents desired.*]

CHAPTER CXXXII.

PROCEEDINGS TO OBTAIN EXAMINATION OF ADVERSE PARTY.

1839. Notice of examination.

1840. Affidavit to accompany notice, when examination is required before issue is joined.

1841. Notice of motion to further limit the examination.

1842. Order limiting the subjects of examination.

The forms given in this chapter are for use in Wisconsin under the provisions of Wis. Stats. 1898 sec. 4096 as amended by Laws 1901 c. 244. Provisions somewhat similar are contained in the Codes of North Dakota and South Dakota. N. Dak. Rev. Codes secs. 5645-5652; S. Dak. Rev. Codes C. P. secs. 478-485.

1839. Notice of examination.

[*Title.*]

TAKE NOTICE that the deposition of A.... B...., the above-named defendant [*or president, or other officer, of the defendant corporation, according to the fact*] will be examined in this action, and his deposition taken at the instance of the defendant, under the provisions of Wis. Stats. 1898 sec. 4096, as amended, on the day of, 19.., at o'clock in the forenoon, before O.... P...., Esq., court commissioner [*or, Hon. L.... M...., circuit judge*], at his office [*or chambers*],^a to-wit, No. in street, city of

[*Date.*]

E.... F....,
Plaintiff's Attorney.

[*Address.*]

[*The party whose deposition is to be taken must be subpoenaed, and his fees paid or tendered, or he will not be obliged to attend.*]

1840. Affidavit to accompany notice, when examination is required before issue is joined.

[*Title.*]

[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in this action; that the general nature and object of the action [*here state same*]; that discovery is necessary and is sought by

the examination of the defendant as to certain facts within the knowledge of the defendant, and not within the plaintiff's knowledge, in order to enable the plaintiff to prepare his complaint herein.

That the points on which such discovery is desired are as follows [*here state the points distinctly*].

A.... B....

[*Jurat.*]

[*This affidavit must accompany the notice if the examination is applied for, before joining of issue.*]

1841. Notice of motion to further limit the examination.

[*Title.*]

SIR: Please take notice that the undersigned will move the court, at the court-room [*or, the Hon. J.... K...., presiding judge, at his chambers*], in the court house in [*state where*], on the day of, 19.., at o'clock in the noon, to limit the subjects of examination of said defendant, under the notice and subpoena heretofore served on him in this action.

[*Date.*]

G.... H....,

[*Address.*]

Defendant's Attorney.

1842. Order limiting the subjects of examination.

[*Title.*]

The plaintiff having given notice of the examination of the defendant to be taken on the [*give date*], and subpoenaed said defendant to appear and be examined at the instance of the plaintiff, and, by his affidavit served with such notice having stated the points on which such discovery is desired, to be as follows [*here state them*]. And the defendant having moved on due notice to further limit the subjects to which such examination shall extend, and such motion coming on to be heard, and after hearing L.... M.... Esq., defendant's attorney for the motion, and O.... P...., plaintiff's attorney, opposing:

ORDERED, that the subjects of said examination be limited as follows [*here specify the points as the judge directs*].

[*Date.*]

L.... M...., Presiding Judge.

CHAPTER CXXXIII.

DEPOSITIONS TAKEN ON NOTICE, STIPULATION OR COMMISSION.

- | | |
|--|--|
| <p>1843. Notice of taking deposition within state (Wis. Stats. 1898 secs. 4100 et seq.)</p> <p>1844. The same, without the state (Wisconsin).</p> <p>1845. Stipulation for taking deposition without further notice (Wisconsin).</p> <p>1846. Form of deposition taken upon notice (Wisconsin).</p> <p>1847. Certificate to be attached to foregoing; statutory form (Wis. Stats. 1898 sec. 4106).</p> <p>1848. Interrogatories for issuance of commission (Wis. Stats. 1898 secs. 4113, 4114 and circuit court rule XVII).</p> <p>1849. Notice of issuing commission upon foregoing interrogatories (Wisconsin).</p> <p>1850. Cross-interrogatories with proposal of additional commissioner (Wis. Stats. 1898 sec. 4114).</p> <p>1851. Commission to take deposition (Wis. Stats. 1898 secs. 4113-4115 and circuit court rule XVII).</p> <p>1852. Deposition on commission and return of commissioners (Wisconsin).</p> <p>1853. Notice of filing of deposition taken on notice (Wisconsin).</p> <p>1854. Notice of return and filing of commission (Wisconsin).</p> <p>1855. Notice of motion to suppress deposition (Wisconsin).</p> <p>1856. Order suppressing deposition (Wisconsin).</p> <p>1857. Affidavit on which to apply to a justice for the taking of testimony of witnesses within the state (Minnesota).</p> | <p>1858. Order by justice for taking deposition within the state (Minnesota).</p> <p>1859. Notice of taking of deposition without the state (Minnesota).</p> <p>1860. Notice of taking deposition within the state (Minnesota).</p> <p>1861. Certificate to deposition taken under the notice last given (Minnesota).</p> <p>1862. Affidavit on which to apply for commission (Minnesota).</p> <p>1863. Notice of application for commission (Minnesota).</p> <p>1864. Order for issuance of commission.</p> <p>1865. Interrogatories and cross-interrogatories for deposition taken on commission (Minnesota).</p> <p>1866. Notice of settlement of interrogatories (Minnesota).</p> <p>1867. Commission to take deposition (Minnesota).</p> <p>1868. Return and certificate of commissioner upon taking deposition (Minnesota).</p> <p>1869. Notice of motion to suppress, and order thereon (Minnesota).</p> <p>1870. Notice of taking deposition (Iowa).</p> <p>1871. Notice of issuing of commission (Iowa).</p> <p>1872. Interrogatories to accompany the foregoing notice (Iowa).</p> <p>1873. Cross-interrogatories to be filed by clerk, if none be filed by adverse party (Iowa).</p> <p>1874. Commission to take deposition (Iowa).</p> |
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|---|---|
| 1875. Agreement to take deposition (Iowa).
1876. Caption for depositions; general form (Iowa).
1877. Certificate to deposition.
1878. The same, by stenographer.
1879. Authentication of official character, if taken before officer having no seal (Iowa). | 1880. Notice by clerk of filing of deposition (Iowa).
1881. Notice to take deposition (Nebraska).
1882. Caption and certificate to depositions taken on notice or agreement (Nebraska).
1883. Depositions (North Dakota and South Dakota). |
|---|---|

1843. Notice of taking deposition within state (Wis. Stats. 1898 secs. 4100 et seq.)

STATE OF WISCONSIN.

In Court County.

A.... B...., vs. C.... D...., Defendant.	Plaintiff, Defendant.	Notice of taking deposition.
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SIR: Please take notice that the deposition of L.... M.... will be taken before O.... P...., Esq., a court commissioner [or, notary public, or, justice of the peace], in and for said county, at his office, No. street, in the town [or village, or, city] of in county, on the day of, 19.., at o'clock in the forenoon of said day, to be used upon the trial of the above entitled action on the part of the plaintiff [or, defendant].

The cause for taking same is that the said L.... M.... lives at in county, more than thirty miles from the place of trial of said action [or, beyond the reach of the subpoena of the court], [or, that said L.... M.... is about to go out of the state, not intending to return in time for the trial of said action], [or, that the said L.... M.... is so sick, or infirm, or aged, as to make it probable that he will not be able to attend at the trial of said action], [or, that the said L.... M.... is a member of the legislature of Wisconsin, which is now in session, and he has waived his privilege].

[Date.]

G.... H....,
Attorney for

To E.... F...., Esq.,
Attorney for

1844. The same, without the state (Wisconsin).

[For use without the state the notice may follow the last preceding form substantially, save that a number of the reasons for taking a deposition within the state are not applicable.]

1845. Stipulation for taking deposition without further notice (Wisconsin).

STATE OF WISCONSIN.

..... Court County.

A.... B....,	} Stipulation.
Plaintiff,	
vs.	
C.... D....,	Defendant.

It is hereby stipulated and agreed that the deposition of L.... M...., a witness for the plaintiff [*or*, defendant] in the above entitled action be taken before O.... P...., Esq., a [*giving official title*] at his office in [*give location of office*] on the day of, 19.., at o'clock in the noon, and that no further or other notice of the taking of said deposition need be given.

[*Date.*]

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

1846. Form of deposition taken upon notice (Wisconsin).

[*Venue.*]

DEPOSITION of L.... M...., a witness taken before me at my office in the city of in said county, on the day of, 19.., pursuant to the annexed notice [*or stipulation*] to be used on the part of the plaintiff [*or*, defendant] in a certain action now pending in the court for county, state of Wisconsin, wherein A.... B.... is plaintiff and C.... D.... is defendant.

The said witness being first duly sworn by me to testify the truth, the whole truth and nothing but the truth relative to said action, in answer to oral interrogatories propounded by E.... F.... who appeared for the plaintiff, deposed and made answer as follows:

My name is L.... M....; my age is years. I reside and have since [*give time*] resided at I know the parties to the action mentioned.

Question [*Here write out question in full.*]

Objected to by defendant on the ground [*state ground given*].

Answer [*Give answer.*]

Upon cross-examination the witness testified as follows:

[*Here follow with cross-examination and re-examination, if any, in the same manner as with direct examination.*]

[Upon concluding let the witness read over the testimony and make all corrections which he desires at the foot of the whole deposition, and then let him sign at the end of the whole.]

O.... P.... [*official title.*]

1847. Certificate to be attached to foregoing, statutory form (Wis. Stats. 1898 sec. 4106).

I, O.... P.... [*add official designation*], in and for said county, do hereby certify that the above described deposition was taken before me at my office, in the town of in said county, on the day of, at o'clock, ... noon; that it was taken at the request of the plaintiff [*or, defendant, or other person procuring it*] upon verbal [*or written*] interrogatories; that it was reduced to writing by myself [*or by deponent, or by L.... M...., a disinterested person, in my presence and under my direction*]; that it was taken to be used in the action of A.... B.... v. C.... D.... now pending in the court [*or to be used in some proceeding or matter, mentioning it*]; and

That the reason for taking such deposition was [*here state the true reason*]; that C.... D.... attended at the taking of such deposition [*or: that a notice of which the annexed is a copy was served upon C.... D.... on the day of, 19.., or, that the deposition was taken in pursuance of the annexed stipulation*]; that said deponent before examination was sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and that said deposition was carefully read to [*or by*] said deponent, and then subscribed by him.

O.... P....,

[*Add official designation.*]

1848. Interrogatories for issuance of commission (Wis. Stats. 1898 secs. 4113, 4114 and circuit court rule XVII).

STATE OF WISCONSIN.

..... Court County.

A.... B....,

Plaintiff,

vs.

C.... D....,

Defendant.

INTERROGATORIES to be propounded to L.... M...., Esq., of the city of, county of, and state of, a witness to be produced, sworn and examined on the part of the above-named plaintiff [*or defendant*] under a com-

mission to be issued out of and under the seal of the court, and directed to O.... P...., Esq., of the city of, county of, and state of, and to such other person as may be named commissioner on the part of the defendant [*or*, plaintiff] above-named.

First interrogatory. What is your name, age, residence and occupation?

Second interrogatory. Do you know the parties to the above entitled action, or either of them, and if yea, how long have you known such parties or party?

[*Continue with the questions, numbering each, and add the following final question*]:

Last interrogatory. Do you know or can you state any matter or thing that may tend to the benefit or advantage of either or any of the parties to this action? If yea, state the same fully and at large in your answer hereto, as if specially interrogated.

E.... F....,
Plaintiff's Attorney.

1849. Notice of issuing commission upon foregoing interrogatories (Wis. Stats. 1898 sec. 4114)

STATE OF WISCONSIN.

..... Court, ... County.

A.... B....,

Plaintiff,

vs.

C.... D....,

Defendant.

SIR: Take notice that at the expiration of ten days from the date of the service of this notice upon you, a commission will be issued out of said court to take the deposition of L.... M...., of the city of, county of, and state of, upon certain interrogatories, of which a copy is herewith served upon you, and such cross-interrogatories as may be duly served and filed herein, before O.... P...., Esq., the commissioner named in the caption to said interrogatories; that the reason for which said deposition is to be taken is that the said L.... M.... is a necessary and material witness for said A.... B.... on the trial of said action, and is not a resident of the state of Wisconsin, but resides in the of, county of, and state of [*or when taken before issue*: that the said L.... M.... is so sick, infirm and aged as to afford reasonable ground to apprehend that he may die or become unable to give his testimony on the trial of this action, *or* that said L.... M.... is about to remove to the

state of, so that he cannot be present nor give his testimony on the trial of this action, *or state any other reason which may exist*].

[Date.]

E. . . . F. . . . ,
Plaintiff's Attorney.

To G. . . . H. . . . , Esq.,
Defendant's Attorney.

1850. Cross interrogatories with proposal of additional commissioner (Wis. Stats. 1898 sec. 4114).

[Title.]

CROSS INTERROGATORIES to be propounded to L. . . . M. . . . , of, county of, state of, before O. . . . P. . . . , Esq., of, a commissioner to be appointed to take the deposition of said witness on behalf of the plaintiff, and also Q. . . . R. . . . , Esq., of, an additional commissioner whom the defendant now proposes to act with said O. . . . P. . . . , the said deposition to be used upon the trial of the above entitled action on the part of the plaintiff [*or defendant*].

First interrogatory. [*Insert and number all the interrogatories.*]

G. . . . H. . . . ,
Defendant's Attorney.

1851. Commission to take deposition (Wis. Stats. 1898 secs. 4113-4115 and circuit court rule XVII).

[Title.]

The State of Wisconsin, to O. . . . P. . . . , of the of, county of, and state of

Whereas, it appears unto our judge of our circuit court, for county, state of Wisconsin, that Y. . . . Z. . . . , of the of, county of, and state of, is [*or are*] [*a*] material witness[es] in a certain cause now pending in our said court, between A. . . . B. . . . , plaintiff, and C. . . . D. . . . , defendant, and that the personal attendance of said witness[es] cannot be procured at the trial of said cause:

And whereas we, in confidence of your prudence and fidelity, have appointed you, and by these presents do appoint you [*a*] commissioner[s] to examine the said witness[es].

NOW THEREFORE, we do authorize and empower you, at a time and place to be fixed by you, diligently to examine the said witnesses on the interrogatories and cross-interrogatories attached to this commission, on his [*or their*] corporal oath[s] first taken before you, and cause the said examination of such witness[es] to be reduced to writing and signed by such witness[es] and by yourself [*or selves*], and then return the same, annexed to the

said commission, unto our court aforesaid with all convenient speed, enclosed under the seal of you, the said commissioner[s].

Witness, the Honorable J.... K...., judge of the court of county, state of Wisconsin, at the of, county of, and state of Wisconsin, this day of, 19..

C.... K...., Clerk.

L.... M....,
..... Attorney.

[*Venue.*]

I, C.... K...., clerk of said court, do hereby certify that the interrogatories and cross-interrogatories attached and referred to in the within commission, are the originals, as the same were filed in my office in the action herein entitled.

Witness, my hand and the seal of the court of county, at the of, county of, and state of Wisconsin, this day of, 19..

C.... K....,
Clerk.

[*The following sections of the statutes and rules of court are usually printed on the back of the commission for the convenience of the commissioners*]:

Wis. Stats. 1898 sec. 4115. The commissioner named in the direct interrogatories shall fix the time and place for executing the commission, and give the other commissioner, if any, one day's notice thereof, when he resides in the same place, and when not, one day's notice in addition for every thirty miles of distance between the place of his residence and the place fixed for executing the commission. If the notice be by mail double time shall be allowed; but notice may be waived in writing or by appearance at the execution of the commission. If there be two commissioners, the place for executing the commission shall be fixed in the county where they reside, unless they agree upon another. The commissioner named in the direct interrogatories shall have charge of and return the deposition.

Rule XVII, sec. 4. At the time and place fixed for executing the commission the commissioner or commissioners shall proceed to execute such commission in accordance with section 4115 Statutes of 1898, and sections 4, 5 and 6 of this rule, copies whereof shall be transmitted with the commission for their instruction. If either of the commissioners shall not attend at the time and place so fixed, the other may proceed to execute the same with like effect as if both were present; but he must certify in his return that the commissioner so absent had due notice of the time and place of executing the same, and that he failed to attend pursuant thereto.

Sec. 5. The commissioner or commissioners shall proceed to execute the same as follows: The commissioners, or one of them, shall publicly administer an oath or affirmation to each witness named in the commission, that the answers which he shall make to each of the interrogatories propounded to him shall be the truth, the whole truth, and nothing but the truth. Each interrogatory, direct and cross, shall be propounded to him, and his answer thereto be correctly reduced to writing,

and with any exhibit thereto be annexed to and returned with the commission. Each witness shall subscribe his name at the end of his answers to the interrogatories, and the commissioner or commissioners shall subscribe his or their names at the foot of each page of the testimony. If any exhibit is produced and proved or referred to in the answer of any witness, it shall be marked as an exhibit by some convenient designation, either by letter or number, by the commissioners, or one of them, and be referred to in the testimony of the witness, and shall be annexed to and returned with the deposition. If the paper be a record or other document not in the control of the party or the commissioner, it shall be sufficient to annex a copy, stated by the witness in his answers to be a true copy thereof. The commissioner or commissioners shall certify in their return that each witness, before giving his evidence, was duly sworn or affirmed, and shall also state the time when the testimony was taken. The return of the commissioner or commissioners shall be indorsed on the commission.

Sec. 6. The proper commissioner shall inclose the answers to all the interrogatories and exhibits in a suitable envelope, which shall be properly sealed, and direct the same to the clerk of the court from which the commission issued, at his place of office, with the title of the action indorsed thereon, and the package shall be immediately transmitted to him by mail or express, the expense thereof to be returned and collected with the commissioner's fees in the action.

1852. Deposition on commission and return of commissioners (Wisconsin).

[Venue.]

Deposition of witness[es] produced and sworn [or affirmed] and examined on the day of, 19.., at in said county, upon the annexed interrogatories and cross-interrogatories, under the annexed commission issued out of the court for the county of, in the state of Wisconsin, in an action pending in said court wherein A.... B.... is plaintiff, and C.... D...., defendant, to be used on the trial thereof, on the part of the plaintiff [or, defendant].

L.... M...., being first duly sworn [or affirmed] according to the directions hereto annexed, deposes and says as follows:

To the first interrogatory he says [insert answer].

To the second interrogatory he says [insert answer and so continue].

[Let each witness read over and sign his testimony, and let the commissioner sign at the foot of each page.]

[Venue.]

I, O.... P...., commissioner named in the annexed commission, do hereby certify that the above deposition was taken before me, at my office in the of, in said county, on the day of, 19.., at o'clock in the noon, under the annexed commission;

That it was taken at the request of the plaintiff [or, defend-

ant] upon the written interrogatories and cross-interrogatories, attached to said commission, and hereunto;

That it was reduced to writing by myself [*or*, by Q.... R...., a disinterested person, in my presence and under my direction];

That it was taken to be used in the action wherein A.... B.... is plaintiff and C.... D...., defendant, now pending in the court of county, and that the reason for taking it was [*here state reason as set forth in the caption to the interrogatories*];

That said deponent[s] before examination was [*or were*] sworn to testify the truth, the whole truth, and nothing but the truth, relative to said cause; and

That said deposition after having been taken was carefully read to [*or by*] said deponent, and then subscribed by him.

[*Signature of commissioner with official designation.*]

1853. Notice of filing of deposition taken on notice (Wisconsin).

[*Title.*]

To G.... H...., Esq.,

Attorney for the defendant above named:

SIR: Please take notice that the deposition of L.... M...., a witness produced, sworn and examined on behalf of the plaintiff above named, before O.... P...., a in and for the county of and state of, and a person by law authorized to take depositions, taken pursuant to the notice hereinbefore served [*or*, stipulation hereinbefore entered into], has been duly certified to and returned by said officer to the clerk of the court of county, and has been filed in the office of said clerk, and that said A.... B.... will claim the right to use said deposition on any trial of said action that may be had.

[*Date.*]

E.... F....,

Attorney for Plaintiff.

1854. Notice of return and filing of commission (Wisconsin).

[*Title.*]

To G.... H...., Esq.,

Attorney for defendant above named:

SIR: Please take notice that the commission heretofore, to-wit, on the day of, 19.., issued in the above entitled action, under the seal of the above entitled court, to take the deposition of L.... M...., a witness to be produced, sworn, and examined on behalf of the plaintiff above named, has been duly executed and returned by the commissioner therein named,

to the clerk of the court of county, and together with said deposition of said witness has been filed in the office of said clerk, and that said plaintiff will claim the right to use said deposition on any trial of said action that may be had.

[Date.]

E.... F....,
Attorney for Plaintiff.

1855. Notice of motion to suppress deposition (Wisconsin).

[Title.]

SIR: Please take notice that upon the deposition of L.... M...., on file in this action [and upon the affidavit hereto annexed, *if an affidavit be made*], the [defendant] by his counsel will move the court, at, *etc.*, at the opening of court on that day or as soon thereafter as counsel can be heard, to suppress said deposition on the ground that [*here specify the grounds*].

[Date.]

G.... H....,
Attorney for Defendant.

[Address.]

[If no notice of filing or return has been given, or if the deposition has been returned so recently before the trial as not to give time for the making of a written motion, an oral motion to suppress may be made at the opening of the trial. In Minnesota a motion to suppress must be made within ten days after service of notice of the return of the deposition, otherwise defects and irregularities are waived. Minn. Rev. Laws 1905 sec. 4678.]

1856. Order suppressing deposition (Wisconsin).

[Title.]

The motion of the defendant above named to suppress the deposition of L.... M.... heretofore taken in this action, having come on to be heard before the court on this day of, 19..; on reading and filing the affidavit of C.... D...., and upon the pleadings in said action and the said deposition, after hearing G.... H...., Esq., attorney for defendant, and E.... F...., Esq., attorney for the plaintiff; being now fully advised in the premises,

ORDERED, that the deposition of L.... M...., taken herein under commission, on the day of, 19.., before O.... P...., Esq. [commissioner], [*or designate officer*], be suppressed and be not received in evidence in this action.

That the plaintiff pay to the defendant ten dollars, the costs of this motion, within days from date

By the Court:

[Date.]

J.... K...., Circuit Judge.

1857. Affidavit on which to apply to a justice for the taking of testimony of witnesses within the state (Minn. Rev. Laws 1905 secs. 4666 et seq.)

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action; that the same is a civil action and was commenced by the personal service of process on the defendant on the day of, 19.. [*or otherwise, according to the fact*], and is now pending in said court; that the following persons, viz. [*name them, with residences*], are each and all necessary and material witnesses on behalf of the plaintiff in the above entitled action, and that their testimony is wanted in said action by said plaintiff, and that said witnesses all live more than thirty miles from the place of trial of this action, to-wit [*state where they live*], [*or, that said witnesses are about to go out of the state of Minnesota, and not to return until after the trial of this action, or state other statutory cause*].

WHEREFORE plaintiff requests that the depositions of said witnesses be taken, as provided by law.

[*Jurat.*]

A.... B....

1858. Order by justice for taking deposition within the state (Minn. Rev. Laws 1905 sec. 4667).

[*Title.*]

It appearing to the undersigned by the affidavit of A.... B.... that the above entitled action is a civil action, and that the same has been commenced and is pending in the above mentioned court, and that L.... M.... and O.... P...., of, in said state, are necessary and material witnesses on behalf of the plaintiff in such action, and that the testimony of said witnesses is wanted in such action by the plaintiff, and that their depositions should be taken, for the reason [*here state reason, as set forth in the affidavit*].

NOW THEREFORE, on application of said A.... B...., I, the undersigned, a justice of the peace within and for the county of in the state aforesaid, do hereby appoint o'clock in the noon, on the day of, 19.., at, in the of, in said county of, and state aforesaid, as the time and place for taking the deposition of said witnesses.

IT IS FURTHER ORDERED that a copy of this order be served upon the said C.... D...., and E.... F...., Esq., his attorney, at least days before the time herein appointed for the taking of the said deposition.

[*Date.*]

Y.... Z...., Justice of the Peace in
and for County, Minn.

[*Venue.*]

I, the undersigned, a justice of the peace in and for the county and state aforesaid, do hereby certify that I have compared the foregoing copy of order with the original thereof, issued by me this day and now in my possession, and that such copy is a true and correct transcript of such original, and of the whole thereof.

In witness whereof, I have hereunto set my hand, this day of, 19..

Y.... Z....,

Justice of the Peace Aforesaid.

1859. Notice of taking of deposition without the state (Minn. Rev. Laws 1905 secs. 4666, 4667).

[*Title.*]

[*Venue.*]

Take notice that the deposition of M.... N...., a witness in said action, on the part of the plaintiff, residing at the city of in the state of, to be used on the trial of said action, will be taken by and before O.... P...., Esq., a [*give official title*] there residing and duly authorized by law to administer oaths therein, at his office, in the said city of, state of, on the day of, 19.., at o'clock in the noon of that day, and that said examination may be adjourned from day to day until the same is closed, and that the reason for taking said deposition is * that said witness is without the state of Minnesota.

[*Date.*]

E.... F....,

Attorney for Plaintiff.

To C.... D....,

Defendant Above Named.

And to G.... H...., Esq.,

His Attorney.

1860. Notice of taking deposition within the state (Minn. Rev. Laws 1905 secs. 4666, 4667).

[*Proceed as in last preceding form to the *, and continue*]: that said witness lives more than thirty miles from the place of trial of this action, to-wit, at [*place of residence*]. [*Or, that said witness is about to go out of this state not intending to return in time for the trial of this action, or that such witness is so sick, or infirm, or aged, as to make it probable that he will not be able to attend at the trial, or hearing*].

[*Conclude as in last preceding form.*]

1861. Certificate to deposition taken under notice, order or commission (Minn. Rev. Laws 1905 sec. 4673).

[*Venue.*]

Be it known that I took the annexed depositions pursuant to the annexed notice [*or order, or commission*]; that I was then and there [*state official title*]; that I exercised the power of that office in taking such deposition; that by virtue thereof I was then and there authorized to administer an oath; that each witness, before testifying, was duly sworn to testify the whole truth and nothing but the truth relative to the cause specified in the annexed notice [*or order*]; that the testimony of each witness was carefully read over to him by me before he signed the same [*if the examination was oral*]; that the examination was conducted on behalf of the plaintiff by E.... F...., and on behalf of the defendant by G.... H.... and [*if the deposition was taken within the state*] that the reason for taking said deposition was [*here state reason*].

Witness my hand [and seal] this day of, 19..

1862. Affidavit on which to apply for commission (Minn. Rev. Laws 1905 sec. 4669).

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action; that the same is a civil action commenced by the service of summons personally on defendant, on the day of, 19.. [*or otherwise, according to the fact*] and that the same is now pending in said court; that the time for answering the complaint herein has expired, and that defendant has not answered or demurred to said complaint [*or, that issue was joined in said action by service of an answer to said complaint on the day of, 19..*]; that one M.... N.... is a material witness in the prosecution of this action, whose testimony is desired by the plaintiff, and that said M.... N.... does not reside in this state, but resides in the city of, state of, and that his personal attendance on the trial of this action cannot be secured.

WHEREFORE affiant applies for the issuance of a commission out of this court to take the deposition of said M.... N...., as provided by law.

A.... B....

[*Jurat.*]

[*If issue has been joined in the action, eight days' notice of this application must be served on the adverse party.*]

1863. Notice of application for commission (Minn. Rev. Laws 1905 sec. 4669).

[Title.]

SIR: Take notice that upon the affidavit of A.... B...., herewith served upon you, and upon the pleadings herein, heretofore served and filed, the undersigned will apply to the court [*or judge, naming him*], at [*state time and place*], for the issuance of a commission out of said court to take the testimony of M.... N...., of, state of, as a witness for the plaintiff in this action.

[Date.]

E.... F....,
Plaintiff's Attorney.

[Address.]

1864. Order for issuance of commission.

[Title.]

Upon the affidavit of A.... B...., filed herein, due notice having been given to the defendant's attorney, of the application for the issuance of a commission in this action to take the testimony of L.... M.... as a witness for the plaintiff,

ORDERED, that a commission issue out of this court to O.... P...., Esq. [*give title*], of, state of, to take the testimony of the said L.... M...., and return the same to this court.

[Date.]

Y.... Z...., Judge.

1865. Interrogatories and cross-interrogatories for deposition taken on commission (Minnesota).

[*These may substantially follow the forms heretofore given for use in Wisconsin. See Forms 1848 and 1850.*]

1866. Notice of settlement of interrogatories (Minnesota: rule XXX, rules district court).

[Title.]

To G.... H...., Esq., Attorney for the Defendant:

TAKE NOTICE that on the day of, 19... , at o'clock A. M., the undersigned will apply to Hon. J.... K...., Judge, etc., at his chambers in [*or, to the court, at the courthouse, etc.*], for settlement of the interrogatories and cross-interrogatories heretofore served and proposed, to be administered to the witness L.... M...., upon the taking of his deposition in the above entitled action.

[Date.]

Yours, etc.,

E.... F....,
Attorney for Plaintiff.

1867. Commission to take deposition (Minnesota).[*Title.*][*Venue.*]

The state of Minnesota to of, in the of

GREETING: Whereas it appears that the above entitled action is now pending in this court, and that issue was joined therein, 19.. [*or that defendant is in default*], and that M.... N...., of, in the county of, and state of, is a material witness on the part of the plaintiff in the said action, whose personal attendance cannot be procured on the trial of said action [and due notice of the said application having been given as required by law].

Now therefore, know ye, that reposing full confidence in your prudence and fidelity, you are hereby appointed sole commissioner to examine said witness, and are hereby authorized and required to cause him to come before you at such time and place as you may therefor designate and appoint, and carefully to take his testimony upon all interrogatories and cross-interrogatories attached to these presents, and none others, under the oath or affirmation of said witness by you first in that behalf duly administered, and the same, when thus taken and signed and certified by you, together with this commission, and the papers hereto annexed, you will return to at, in said county of, with all convenient speed.

Witness, Hon. Y.... Z...., at
[SEAL.] aforesaid, this day of, 19..
C.... K...., Clerk.

1868. Return and certificate of commissioner upon taking deposition (Minnesota district court rule XXX).

[*The caption of the return and body of the deposition may be substantially as in Form 1852, and the certificate as follows*]:

I, O.... P...., commissioner named in the within and above written commission, do certify that the said commission was executed, and the testimony of L.... M.... was taken before me at my office, No. in the city of state of on the day of at o'clock in the noon, and was reduced to writing by myself [*or by deponent, or by N.... D...., a disinterested person, in my presence and under my direction*]; that the said testimony was taken by and pursuant to the authority and requirements of the said commission, and upon the interrogatories annexed and herewith returned. The said witness, before examination, was sworn to testify to the whole truth and nothing but the truth relative to the cause speci-

fied in said commission, and the testimony of said witness was carefully read to [or by] said witness [by me] and then subscribed by him in my presence.

O.... P....,
Commissioner.

[The witness must sign his name or make his mark at the end of his testimony and upon each piece of paper on which any part of his testimony is written.]

1869. Notice of motion to suppress, and order thereon (Minnesota).

[These may follow substantially Forms Nos. 1855 and 1856, heretofore given for use in Wisconsin.]

1870. Notice of taking deposition (Iowa Code sec. 4687).

[Title.]

TAKE NOTICE that the deposition of L.... M.... of county of, a witness on behalf of the plaintiff in the above entitled action will be taken before O.... P...., Esq., a *[give official title]*, at his office in the said city of on the day of, 19.., at o'clock A. M., and that the same will be continued from day to day until completed.

[Date.]

E.... F....,
Attorney for Plaintiff.

To G.... H...., Esq.,
Attorney for Defendant.

1871. Notice of issuing of commission (Iowa Code sec. 4689).

You are hereby notified that on the day of, 19.., at o'clock .. M. there will be issued from the office of the clerk of the district court in and for the county of Iowa, a commission in the above entitled action, directed to O.... P.... *[give his official title]*, of the city of state of, directing him to take deposition of *[insert names of witnesses]* upon the several interrogatories served herewith. The same when so taken to be read upon the trial of the above entitled cause on the part of said plaintiff.

Dated at Iowa, this day of, 19..

E.... F....,
Plaintiff's Attorney.

To C.... D...., Defendant.
And to G.... H...., Esq., His Attorney.

1872. Interrogatories to accompany the foregoing notice (Iowa).

[*Title.*]

INTERROGATORIES to be propounded to L.... M.... in pursuance of the commission herein to be issued.

Int. 1. State your name, age, occupation and place of residence.

Int. 2. Are you acquainted with the parties to this suit, or either of them, and if so, how long have you known them or either of them?

[Here follow with the questions necessary to bring out the facts sought for: the deposition must show affirmatively that a cause for taking the same exists, unless the fact appears elsewhere in the record. Iowa Code sec. 4709.]

1873. Cross-interrogatories to be filed by clerk, if none be filed by adverse party (Iowa Code sec. 4692).

[*Title.*]

The defendant, not having filed any cross-interrogatories in the above entitled action, and the time for filing same having expired, I, Y.... Z...., clerk of said court, do file the following cross-interrogatories, to be propounded to the witness L.... M...., viz.:

Int. 1. Are you directly or indirectly interested in this action, and if interested, explain the interest you have?

Int. 2. Are all your statements in the foregoing answers made from your personal knowledge, and if not, do your answers show what are made from your personal knowledge, and what from information, and the source of the information? If not, show what is from information and give its source.

Int. 3. State everything you know, concerning the subject of this action favorable to either party.

Y.... Z...., Clerk, etc.

1874. Commission to take deposition (Iowa).

[*Title.*]

[*Venue.*]

To O.... P...., Esq. [*Give title.*]

You are hereby authorized and required, at such time and place as you may designate, in the county of and state of to cause to come before you L.... M...., of in said county, for the purpose of taking his deposition upon

the interrogatories and cross-interrogatories hereto annexed, which depositions are to be used in evidence on the trial of the above entitled cause now pending in the district court of county, Iowa.

WITNESS [name of clerk], clerk of said district court of said county, and the seal thereof hereto affixed, at this day of, 19..

[SEAL.]

C.... K....,
Clerk, etc.

[Instructions to the officer, embodying the requirements of secs. 4699 to 4706, inclusive, of the Iowa Code, should accompany the commission.]

1875. Agreement to take deposition (Iowa Code sec. 4686).

[Title.]

It is stipulated and agreed that the deposition of L.... M...., a witness in the above entitled action on the part of the plaintiff, may be taken upon the interrogatories and cross-interrogatories annexed hereto [or upon oral interrogatories] before O.... P...., Esq., as commissioner [give official title] of county of state of at his office in said city of on the day of, 19.., said deposition to be used upon the trial of the above entitled action by the said plaintiff.

Dated, 19..

E.... F...., Plaintiff's Attorney.
G.... H...., Defendant's Attorney.

1876. Caption for depositions, general form (Iowa).

DEPOSITIONS OF WITNESSES produced, sworn, and examined at the city of county of and state of before me, O.... P.... [give official title], in pursuance of the annexed notice [or, if taken upon commission, a commissioner duly appointed for that purpose by the terms of the annexed commission, or agreement] in a certain action now pending in the court of the state of Iowa for county, wherein A.... B.... is plaintiff and C.... D.... is defendant, on behalf of the plaintiff.

L.... M.... being duly sworn [or affirmed], and examined on the part of the plaintiff, testified as follows:

[Insert interrogatories and answers.]

Upon cross-examination he testified as follows:

[Insert cross-interrogatories, etc.]

[The witness should sign at the end of his testimony and a jurat should be added, signed by the officer.]

1877. Certificate to depositions.

[Venue.]

I, O.... P.... [give official title] [if taken on commission or agreement, add: a commissioner duly appointed in and by the annexed commission, or agreement], do hereby certify that in pursuance of the annexed notice [or commission, or agreement, as the fact may be], I caused to come before me at on the day of, 19.., between the hours of o'clock in the forenoon and o'clock in the afternoon [names of witnesses], who were then and there by me duly sworn [or affirmed] and examined, and their testimony was correctly and fully written down by me [or, by Q.... R.... a disinterested person, under my direction and in my presence] and after being by me read over to said witnesses, the same was subscribed and sworn to by them respectively in my presence, and their said depositions are now herewith returned. I further certify that E.... F.... was present and conducted the examination on behalf of the plaintiff, and G.... H.... was present and cross-examined said witnesses for the defendant. [Or if taken on commission and on interrogatories: and I further certify that neither of the parties, nor the agent or attorney of either of said parties was present during the taking of said depositions.]

[SEAL.] WITNESS my hand and official seal,
this day of, 19.., at
O.... P....,
[Official title.]

1878. The same, by stenographer.

[Venue.]

I, O.... P.... [give official title], a stenographer, hereby certify that in pursuance of the annexed notice [or commission] caused to come before me at on the day of, 19.., between the hours of o'clock in the forenoon and o'clock in the afternoon [names of witnesses] who were then and there by me duly sworn [or affirmed] and examined, and their examination was by me correctly taken down in shorthand, and was by me correctly extended into long hand, and when so extended was read to said witnesses respectively in my presence, and the same was then subscribed and sworn to by said witnesses respectively in my presence, and such extension and said shorthand notes are now herewith returned as the depositions of the said witnesses. I further certify that before begin-

ning the taking of said depositions in shorthand I took and subscribed an oath to take down and transcribe correctly such testimony, and said oath is hereto attached. I further certify that the translation of my said shorthand notes so taken is a full, true and complete translation thereof.

I further certify that E.... F.... was present and conducted the examination on behalf of the plaintiff, and G.... H.... was present and cross-examined said witnesses for the defendant [*as the case may be*].

[SEAL.]

WITNESS my hand and official seal hereto annexed at in the county of state of this day of , 19..

[*Signature of officer.*]

1879. Authentication of official character, if taken before officer having no seal (Iowa Code sec. 4703).

[*Venue.*]

I, C.... K...., clerk of the court in and for said county, hereby certify that O.... P...., before whom the foregoing depositions were taken, was at the time of taking the same [*give official title*], and duly qualified as such and authorized to take such depositions, and that his signature to the above certificate is genuine.

[SEAL.]

GIVEN under my hand and the seal of said court, this day of , 19..

C.... K...., Clerk, etc.

1880. Notice by clerk of filing of deposition (Iowa Code sec. 4711).

[*Title.*]

[*Venue.*]

To E.... F...., Esq., Plaintiff's Attorney, and G.... H...., Esq., Defendant's Attorney.

TAKE NOTICE that the depositions of [*here insert names of witnesses*], who have been examined as witnesses on behalf of plaintiff in the above entitled cause now pending in said court, were received by me and filed in my office at in county, Iowa, on the day of , 19..

[SEAL.]

WITNESS my hand and seal of said court, the day and date above written.

C.... K...., Clerk, etc.

1881. Notice to take deposition (Nebraska).

.... Judicial District of Nebraska
 District Court, ... County.

A.... B....,	}
Plaintiff,	
vs.	
C.... D....,	
Defendant.	

[*Venue.*]

To C.... D...., the above named defendant, and G....
 H...., his attorney.

TAKE NOTICE that on the day of, 19.., the plaintiff will take the depositions of [*name witnesses*] to be used as evidence on the trial of the above entitled cause, before O.... P...., Esq. [*give official title*] at county of and state of, at o'clock .. M. of that day, with authority to adjourn from day to day until such depositions shall all have been taken.

[*Date.*]

E.... F....,
 Plaintiff's Attorney.

1882. Caption and certificate to depositions taken on notice or agreement (Nebraska).

DEPOSITIONS of sundry witnesses taken before me [*give name and official title*] within and for the county of in the state of on the day of in the year 19.. between the hours of A. M. and P. M., at in said county, pursuant to the annexed notice [*or agreement, as the case may be*] to be read in evidence in behalf of the plaintiff, in an action pending in the court, in which A.... B.... is plaintiff and C.... D.... is defendant.

L.... M...., of lawful age, being by me first duly examined, cautioned and solemnly sworn [*or affirmed*], testifies as follows:

[*Here follow questions and answers.*]

[*Adjournment should be noted, with reasons, and each witness must sign his own deposition.*]

[*Venue.*]

I, O.... P.... [*here official title*] hereby certify that [*name witnesses*] were by me first severally duly sworn [*or affirmed*] to testify the truth, the whole truth, and nothing but the truth,

and that the depositions by them respectively subscribed as above set forth, were reduced to writing by myself [*or if by any other person name him, and say: by J.... R...., who is not interested in the suit, in my presence, and*] in the presence of the witnesses respectively, and were respectively subscribed by the said witnesses in my presence, and were taken at the time and place in the annexed notice [*or agreement*] specified; that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit [*if there be adjournments add*], and said depositions were commenced at the time in said notice specified, and continued by adjournments from day to day, as above stated.

WITNESS my hand and official seal,
[SEAL.] this day of, 19..
[Signature.]

[Endorsement on envelope]:

[Title of case.]

DEPOSITIONS in said action on behalf of the plaintiff.

These depositions taken, sealed up, indorsed, addressed, and transmitted by me.

[Official signature.]

1883. Depositions (North Dakota and South Dakota).

[With some slight changes, the forms given for use in Wisconsin and Minnesota may be used in North and South Dakota.]

CHAPTER CXXXIV

PERPETUATION OF TESTIMONY.

- | | |
|---|---|
| 1884. Application for perpetuation of testimony of witness within the state (Wisconsin and Minnesota).
1885. Notice thereon (Wisconsin and Minnesota).
1886. Certificate to same (Wisconsin and Minnesota).
1887. Application for commission to perpetuate the testimony of witnesses outside of the state (Wisconsin and Minnesota).
1888. Order thereon (Wisconsin and Minnesota).
1889. Commission, return, and certificate, in proceedings for the perpetuation of testimony (Wisconsin and Minnesota).
1890. Application to take deposition for the perpetuation | of testimony against all persons (Wisconsin).
1891. Commission thereon (Wisconsin).
1892. Notice of perpetuation of testimony, as against all persons, to be given by commissioner (Wisconsin).
1893. Return and certificate in proceedings to perpetuate testimony against all persons (Wisconsin).
1894. Petition for perpetuation of testimony (Iowa, South Dakota and Nebraska).
1895. Order thereon (Iowa, South Dakota and Nebraska).
1896. Petition for perpetuation of testimony (North Dakota).
1897. Order thereon (North Dakota). |
|---|---|

The statutes governing the perpetuation of testimony where suit has not yet been brought, are quite similar in substance in the various states, but differ in essential details. Close attention to the statutes should be paid in any case, as the courts will doubtless require full compliance with all the statutory requirements before allowing the introduction of such testimony in evidence. *Accola v. C., B. & Q. R. R. Co.*, 70 Iowa, 185 s.c. 30 N. W. 503. The various provisions on the subject will be found as follows: Wis. Stats. 1898 secs. 4117-4134; Minn. Rev. Laws 1905 secs. 4685-4696; Iowa Code secs. 4718-4723; N. Dak. Rev. Codes secs. 5707-5713; S. Dak. Rev. Codes C. P. secs. 542-547; *Cobbey's Ann. Stats. of Nebr.* secs. 1406-1412.

1884. Application for perpetuation of testimony of witness within the state (Wisconsin and Minnesota).

STATE OF WISCONSIN.

..... Court County.

In the Matter of the Application
of A.... B.... for the per-
petuation of the testimony of
M.... N....,

[*Venue.*]

A.... B...., being duly sworn, says that he is the owner in fee simple, and entitled to the possession of that certain parcel of land in said county described as follows [*insert description*], and that the said land is now wrongfully occupied and withheld from the plaintiff by C.... D.... and Y.... Z.... [*or otherwise state the plaintiff's title, claim or interest, and the subject in dispute, according to the fact*]. That the names and residences of all persons who are interested or supposed to be interested in the plaintiff's said title and claim, and in the said land, are as follows: C.... D.... of state of; Y.... Z.... of state of; [and O.... P...., whose residence is unknown]. That one M.... N.... of in said county, knows certain facts concerning plaintiff's said title and claim which the affiant deems material and essential to said title and claim, and affiant therefore desires to perpetuate the evidence of the said M.... N.... * and requests that his deposition be taken, as provided by law for the perpetuation of testimony.

A.... B....

[*Jurat.*]

1885. Notice thereon (Wisconsin and Minnesota).

[*Title as in last form.*]

To C.... D.... of county of state of; Y.... Z.... of county of state of [and to O.... P...., whose residence is unknown].

You and each of you are hereby notified that upon the written application of A.... B...., the deposition of M.... N.... of will be taken before the undersigned, judge of the court for the county of state of, at his chambers in the courthouse in the city of in said county, on the day of, 19.., at o'clock A. M. of that day, for the purpose of perpetuating the testimony of the said M...., N.... concerning the matter mentioned in the said application of said A.... B....

[*In Minnesota, in case it appears that any of the persons to be notified are non-residents, or for other reason can not be served, add*]: And it appearing satisfactorily that by reason of the non-residence of said O.... P.... [*or other cause*], it will be impossible to serve this notice upon him personally, it is ordered that this motion be published for three successive weeks in the N.... Z...., a newspaper printed and published in the city of county of [*county where applicant resides*], which publication, when completed, shall be equivalent to personal service thereof upon said O.... P....

Dated, 19..

J.... K...., Judge, ... Court.

1886. Certificate to same (Wisconsin and Minnesota).

[*The caption and body of deposition may follow Form 1846, with necessary formal changes, and the certificate as follows*]:
[*Venue.*]

I, Q.... R...., judge, etc. [*give official title*] hereby certify that the foregoing deposition was taken before me at in the city of in said county, on the day of, 19..; that it was taken upon the written statement and request of A.... B...., which is hereto attached, and upon verbal interrogatories; that it was reduced to writing by myself [*or by the defendant, or by J.... R...., a disinterested person, in my presence and under my direction*]; that C.... D...., of and Y.... Z...., of were duly notified to attend upon the taking of said deposition by personal service upon them of the notice hereto attached [and that said notice was duly served upon O.... P...., a non-resident of said state, by publication of the same as therein directed]; that A.... B.... and C.... D.... attended upon the taking of said deposition; that the same was taken in perpetual remembrance of the thing set forth in said written statement of A.... B.... hereto attached; that the said deponent, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth relative to said matter, and that said deposition was carefully read over to [*or by*] said deponent, and then subscribed by him.
[*Date.*]

J.... K...., Judge, etc.

1887. Application for commission to perpetuate the testimony of witnesses outside of the state (Wisconsin and Minnesota).

[*The application may follow the first form given in this Chapter, to the *, and then continue*]: and hereby applies to the court

for the issuance of a commission to take the testimony of said witness in the manner provided by law.

A.... B....

[*Jurat.*]

1888. Order thereon (Wisconsin and Minnesota).

[*Title as in Form 1884.*]

[*At a term, etc.*]

Application in writing having been duly made to this court by A.... B.... for the issuance of a commission for the perpetuation of the testimony of M.... N.... of state of concerning the matter and claim in said application set forth, and it appearing that C.... D.... of state of and Y.... Z.... of state of are adversely interested in the case and in the applicant's said claim, and are the only persons so interested;

IT IS ORDERED that said application be heard before this court, at the court house in the city of county of on the day of, 19.., at o'clock A. M. of that day, or as soon thereafter as counsel can be heard, and that notice of said application and statement be served on the said C.... D.... and Y.... Z...., by serving upon each of them a true copy of the same, with a copy of this order, at least fourteen days before the time above fixed for said hearing.

[*In Minnesota, if any adverse party is a non-resident or his residence is unknown, add: And it is further ordered that notice of the said application be given to the said Y.... Z.... who resides out of this state, or whose residence is unknown, by publishing a copy of said statement and this notice for three successive weeks, etc. continue as in Form 1885.*]

[*This order must be made by the court.*]

1889. Commission, return, and certificate, in proceedings for the perpetuation of testimony (Wisconsin and Minnesota).

[*The statutes of both Wisconsin and Minnesota provide that the deposition shall be taken upon written interrogatories and cross-interrogatories, if any be filed, and that it be taken and returned in substantially the same manner as if to be used in an action: the forms given in the last preceding chapter, therefore, may be used with such incidental changes as are made necessary by the fact that the deposition is not taken in an action pending, but only to perpetuate testimony. Wis. Stats. 1898 sec. 4127; Minn. Rev. Laws 1905 sec. 4695.*]

1890. Application to take deposition for the perpetuation of testimony against all persons (Wis. Stats. 1898 sec. 4130).

[*This proceeding is peculiar to Wisconsin; the application may follow Form 1887, adding at the end thereof the phrase: "so that the same may be evidence against all persons."*]

A.... B....

[*Jurat.*]

1891. Commission thereon (Wisconsin).

[*Title.*]

THE STATE OF WISCONSIN to L.... M...., Esq., of and state of

Whereas written application has been duly made by A.... B.... to our said court for the taking of the deposition of M.... N.... of state of, in order to perpetuate the testimony of the said M.... N.... with reference to the matters and claims in said application set forth, and the court being satisfied that there is sufficient cause for the taking of the deposition of said M.... N....; and whereas we, having full confidence in your prudence and ability, have appointed, and by these presents do appoint you a commissioner to examine said M.... N....;

NOW THEREFORE we do authorize, etc. [*follow Form 1851 adding at the end, before the words "Witness, etc.," the following*]: You are also hereby directed to publish in the [*name newspaper*], a newspaper published at state of, for three successive weeks [*or otherwise, as court deems best*], a notice stating the time and place of the taking of such deposition, with a brief statement of the subject-matter thereof, which notice shall be addressed specially by name to [*name all persons known or supposed to be interested in the case*] and generally to all other persons, in order that they may attend and propose cross-interrogatories to said witnesses [*which notice shall also be personally served on, name persons*] at least days before the time appointed for the taking of said deposition.

WITNESS, etc. [*follow attesting clause of Form 1851.*]

1892. Notice of perpetuation of testimony, as against all persons, to be given by commissioner (Wis. Stats. 1898 sec. 4132).

[*Title as in first form in this Chapter.*]

To O.... D.... of state of [*name all others known or supposed to be interested*] and to all other persons.

You and each of you are hereby notified that the deposition

of M.... N...., for the purpose of perpetuation of the testimony of said M.... N.... concerning the matter hereinafter named, will be taken by and before the undersigned, as commissioner, at [name place], on the day of, 19.., at o'clock .. M., and that you and each of you may attend at said time and place and propose cross-interrogatories to said witness.

You are further notified that the subject-matter of said deposition, and of the testimony of said M.... N.... will be the claim of A.... B.... that he is the owner, and entitled to possession of that certain parcel of land [describe same] and that C.... D.... and Y.... Z.... wrongfully occupy and withhold the same [or state nature of subject, according to the fact].

[Date.]

P.... Q....,
Commissioner.

1893. Return and certificate in proceedings to perpetuate testimony against all persons (Wisconsin).

[The return and certificate may follow substantially Form 1852, with such incidental changes as are made necessary by the difference in the situation, adding to the certificate the proper clauses showing that notice was given by the commissioner, according to sec. 4132 Wis. Stats. 1898, and the directions of the court.]

1894. Petition for perpetuation of testimony (Iowa, South Dakota and Nebraska).

[State and Court.]

In the Matter of the Application
of A.... B.... for the per-
petuation of the testimony of
M.... N....

To the Court of County, State of

THE PETITION of A.... B.... respectfully shows to the court that he is the owner in fee of certain lands [describing them] now wrongfully withheld from him by [name adverse parties], and that he desires to perpetuate the testimony of one M.... N.... of in said county with reference to the said title and claim of the plaintiff to said lands, and to propound to the said M.... N.... the following interrogatories [here set forth questions in full].

That C.... D.... and [name others, if any] of are the only persons interested in the said subject-matter of this pro-

ceeding [*or if not known by name, describe the persons as devisees, alienees, or otherwise.*]

That your petitioner expects to be the plaintiff [*or defendant*] in an action in a court of this state in which such testimony will, as he believes, be material [*add, where petitioner expects to be plaintiff*] and that the obstacles which prevent the immediate commencement of said action by him, are as follows [*state obstacles*].

WHEREFORE petitioner prays that an order be made allowing the examination of said witness and prescribing the notice thereof to be given, and for such further order as may be just.

A.... B....

[*Add verification.*]

1895. Order thereon (Iowa, South Dakota and Nebraska).

[*Title as in last preceding form.*]

[*Caption.*]

On reading and filing the verified petition of A.... B.... in the above entitled matter, it appearing satisfactorily to the court that the occasion for the taking of the deposition of said M.... N.... is a proper one;

IT IS ORDERED that the examination of the said M.... N...., upon the interrogatories contained in said petition, and such cross-interrogatories as may be filed according to law, be and the same is hereby allowed for the purpose of perpetuating the testimony of the said M.... N.... with reference to the subject-matter named in said petition;

And further ordered that said examination be taken by E.... F...., a notary public, at [*name place*] on [*name time*] and * that C.... D.... and [*name others adversely interested*], be notified of the taking of said testimony by personal service upon each of them of a copy of said petition, and of this order, at least days before the day herein set for said examination, [*or if it appears that the interested parties can not be personally notified, substitute after **]: it satisfactorily appearing to the court that [*name parties adversely interested*], cannot be personally notified, it is

Further ordered that O.... P...., Esq., an attorney of this court, be and he is hereby appointed to examine said petition and prepare and file cross-interrogatories to those contained therein on behalf of said interested parties.

By the Court:

J.... K...., Judge.

[*The return and certificate may be adapted from Forms 1876, 1877 and 1878.*]

1896. Petition for perpetuation of testimony (North Dakota).
[State and Court.]

In the Matter of the Application
of A.... B.... for the per-
petuation of the testimony of
M.... N....,

To the Hon. J.... K...., Judge of the Court.

THE PETITION of A.... B.... respectfully shows that he expects to be plaintiff [*or defendant*] in an action in a court of this state, and that he expects that C.... D.... and E.... F.... of in said state will be the adverse parties in said action.

Or: that he is interested as joint tenant in certain real estate [*describing same*], and that it is necessary in order to prove and perfect his title thereto that the fact that he was and is the son and heir at law of one P.... Q.... be proven [*or state the fact as it is*], though no action is now anticipated. That one M.... N.... of county of state of is personally cognizant of the fact of the applicant's said heirship, and that your petitioner expects to prove by said M.... N.... [*here state specific facts*].

WHEREFORE your petitioner prays for an order allowing said examination, and prescribing the proper notice thereof, and for such other order as may be just and proper.

A.... B....

[*Add verification.*]

1897. Order thereon (North Dakota).

[*Title as in last preceding form.*]

Upon reading and filing the petition of A.... B...., it appearing to me that sufficient cause exists therefor:

ORDERED that the examination of the said M.... N.... be, and the same is hereby allowed, and that the deposition of the said M.... N.... for the purpose of perpetuating his testimony with reference to the subject-matter named in said petition, be taken before E.... F...., a notary public at on, 19.., and C.... D.... and [*name other adverse parties*] be notified of the taking of said depositions by personal service upon each of them of a copy of this notice, and of said petition at least days before the time fixed for the taking of said deposition. [*If the adverse parties are unknown, or reside out of the state, the order must prescribe here notice by publication, or otherwise, as the judge directs, instead of personal.*]

It is further ordered that when the said deposition shall have been taken, the said officer taking the same shall duly certify and return the same to C.... K...., Esq., clerk of the court for county, at his office in county of state of North Dakota.

[Date.]

J.... K...., District Judge.

[If the testimony be taken in another state, it must be taken upon commission. For forms, see the preceding Chapter.]

CHAPTER CXXXV.

NOTICES OF TRIAL.

- | | |
|---|--|
| 1898. Notice of trial and note of issue (Wisconsin).
1899. The same (Minnesota). | 1900. The same (North Dakota and South Dakota).
1901. Notice of trial (Iowa). |
|---|--|

1898. Notice of trial and note of issue (Wis. Stats. 1898 sec. 2845).

STATE OF WISCONSIN.

..... Court County.

A.... B...., Plaintiff, vs. C.... D...., Defendant.	}
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PLEASE TAKE NOTICE that the above entitled action will be brought to trial at the term of the aforesaid court, to be held at the court house in the of in the said county of on the day of next, at the opening of court on that day, or as soon thereafter as counsel can be heard.

Dated, 19.. Yours, etc.,

To G.... H...., Attorney for Defendant.	E.... F...., Plaintiff's Attorney.
--	---------------------------------------

[*Admission of service of above*]: Service of a copy of above notice admitted this day of, 19..

G.... H...., Defendant's Attorney.	
---------------------------------------	--

[*The note of issue is usually attached to the notice of trial as follows*]:

Note of Issue in the above Entitled Cause.

E.... F...., Plaintiff's Attorney.

G.... H...., Defendant's Attorney.

Issue of fact [*or law*] for jury [*or court*]. Joined, 19..

Filed by E.... F...., Plaintiff's Attorney, ..., 19..

M.... N...., Clerk.

1899. The same (Minn. Rev. Laws 1905 sec. 4165).

[The notice of trial may follow the last preceding form and the note of issue as follows] :

[Title of cause.]

Note of Issue.

Issue of

Last pleading served, 19..

E.... F...., Attorney for Plaintiff.

G.... H...., Attorney for Defendant.

Filed, 19..

C.... K...., Clerk.

1900. The same (N. Dak. Rev. Code sec. 5422; S. Dak. Rev. Code C. P. sec. 246).

[The notice of trial and note of issue may follow the Minnesota form last given.]

1901. Notice of trial (Iowa Code sec. 3658).

[In Iowa notice of trial is only required in an action which has been continued after issue joined. Iowa Code sec. 3658; Erickson v. Barber, 83 Iowa, 367 s.c. 49 N. W. 838. The notice when necessary may doubtless follow the first form given in this chapter for use in Wisconsin.]

CHAPTER CXXXVI.

CONTINUANCE OR POSTPONEMENT OF TRIAL.

- | | |
|--|---|
| 1902. Affidavit for continuance because of absence of witnesses (Wisconsin). | mentary evidence (Wisconsin). |
| 1903. The same, for unexpected absence or illness of witness. | 1905. Affidavit for continuance because of sickness of sole counsel (Iowa). |
| 1904. Affidavit for continuance because of absence of docu- | 1906. Motion for continuance (Iowa). |
| | 1907. Order continuing or postponing trial. |

Applications to postpone the trial of a cause to a subsequent term or to a future day in the current term are addressed to the sound discretion of the court. In general terms it may be said that such applications must be accompanied by proof showing that the party applying has used due diligence to prepare for trial and also what diligence has been used; that he can not safely proceed to trial without certain evidence or witnesses which are not at hand and cannot be at hand if the trial proceeds at once; that due effort has been used [describing it] to procure such evidence, or the attendance of such witnesses; the names and residences of such witnesses, and what facts [as distinguished from legal conclusions] they will swear to, and the reasons of the applicant for his belief that they will so swear; also sufficient facts showing reasonable grounds to believe that such testimony or witnesses can be obtained if the action be continued as requested, and that there are no other documents or witnesses which can be procured by whom the facts can be proven.

In Wisconsin the subject is governed by Rule XIX of the rules of the circuit courts and it is required that an affidavit of merits be incorporated in the affidavit, and the motion must be made on or before the third day of the term unless for a cause thereafter occurring or discovered. In Iowa the subject is regulated by statute. Iowa Code secs 3662-3666. In North Dakota the subject is covered by Rule XXVII of the rules of the district courts, and it is provided that no counter affidavits shall be received on motion for continuance.

1902. Affidavit for continuance because of absence of witnesses (Wisconsin).

[Title of court.]

A.... B.... ,	}
Plaintiff,	
vs.	
C.... D.... ,	
Defendant.	

[Venue.]

C.... D.... , being first duly sworn, says that he is the defendant in the above entitled action; that issue was joined therein on the day of, 19.. , and that this defendant has a valid defense in whole in said action [*or in part, specifying which part*].

That this affiant has fully and fairly stated the case to G.... H.... , Esq., his counsel herein, who resides at in said county, and that upon the statement thus made he is advised by said counsel that he has a valid and substantial defense to said action and the whole thereof, [*or to some specific part thereof, stating what part.*]*

That affiant has used due diligence to prepare for trial of this action at the present term; that he caused a subpoena to be issued herein on the day of, 19.. , for service on L.... M.... and O.... P.... [*or otherwise state what efforts were made to procure the attendance of the witnesses*]; that the sheriff of said county to whom said subpoena was on that day delivered, informs this affiant that said M.... N.... and said O.... P.... are now absent from this state and somewhere in state of, having left this state about, 19..; that their residence in this state is the town of county of, and defendant has made inquiry in the neighborhood of their residence and is informed that they are temporarily absent, but not expected to return for about months.**

That said M.... N.... and O.... P.... are necessary and material witnesses without whose testimony he cannot safely proceed to trial; and that no other evidence is at hand, nor witness nor witnesses in attendance or known to him, whose testimony could have been procured in time, upon whom he can safely rely to prove the particular facts that he expects to prove and believes can be proved by such absent witnesses above named, to maintain the issue in respect thereto on his part.

That after fully and fairly stating to his said counsel the

facts which he expects to prove by said absent witnesses he is advised by his said counsel and verily believes that he can not safely go to trial without the testimony of each of them.

That neither of said witnesses is absent by this affiant's consent, connivance or procurement; that they left without his knowledge; and soon after the joining of issue herein, each of them told this affiant personally that he expected to be in county when the term of this court should be held, and for that reason this affiant took no steps to procure their depositions to be used upon the trial hereof.

Affiant further says, that he expects to prove by said M.... N.... the following facts, viz. [*here state facts*] and by said O.... P.... the following facts [*state same*].

That the grounds of his expectation that he can prove such facts by said witnesses are as follows [*state grounds as for instance, that each of said witnesses has stated to affiant that they could and would testify to said facts, or otherwise according to the fact*].

Affiant further says that if a continuance of the trial of this action [*or a postponement of the trial until , 19..*] be granted he will be able as he believes and intends to procure the attendance of said witnesses [*or will take the depositions of said witnesses for use on the trial*].

C.... D....

[*Jurat.*]

1903. The same, for unexpected absence or illness of witness.

[*Proceed as in last preceding form, substituting between * and ** the following*]:

That affiant has used due diligence to prepare for the trial of this action at the present term, that he expected to call as a witness on said trial one M.... N...., and that, two weeks before the first day of the present term affiant went to the residence of said witness, in the town of, in the county of, for the purpose of subpoenaing him to attend as a witness in said action, at said circuit; that he there learned that said witness had unexpectedly left home the day before, in order to go to the state of, and intended to remain there about two months; and deponent further says, he had no knowledge that said witness was going to be absent from home, until he learned it when he went to subpoena said witness, as aforesaid;

[*Or, That one M.... N...., who resides at, was, on the day of last past, duly subpoenaed to attend the trial of this action; but that since the service of the said subpoena he has become seriously ill, and is now wholly unable to*

attend this court, or be present at the trial of this action in its order on the calendar. But deponent has been informed by R.... S...., the physician attending the said witness, and verily believes, that the said witness will be able to attend this court by the time of the next circuit, appointed to be held at, etc.]

[Make such incidental changes in the other statements of the preceding form as are necessary.]

1904. Affidavit for continuance because of absence of documentary evidence (Wisconsin).

[Title of court and cause.]

*[Proceed as in first form in this chapter to the *, continuing as follows]:* That there are in existence certain written books *[or documents, describing them e. g., consisting of the business account books kept by the plaintiff in his business during the year 19..]* without examination and production of which upon the trial affiant cannot safely proceed to the trial of this cause as he is advised and verily believes after fully and fairly stating to his said counsel the facts which he expects to prove by said books *[or documents]*.

That said books *[or documents]* are now, as he is informed and verily believes *[state where and in whose custody they are believed to be]*, that they are not absent by the affiant's procurement, consent or connivance; that up to the day of, 19.., said books were *[state where]* and could have been produced here upon the trial of this case and affiant relied upon such fact and was not informed of their removal nor did he learn thereof until the day of, 19.., when it was too late to secure their return; that said books *[or documents]* contain entries made by the plaintiff showing credits for money paid by the defendant to the plaintiff upon the cause of action stated in the complaint *[or otherwise state the nature and contents of the books or documents]* and that affiant expects to prove thereby *[here state the facts to be proven fully]*. That the grounds of his expectation that he can prove such facts by said books are as follows *[here state grounds]*.

That the affiant has used his best exertions to procure the presence of said books upon the trial; that he *[here state what efforts were used as by giving notice to produce or otherwise, or if the opposing party gave assurance of their production, state the fact]*.

That if a continuance of the trial of this cause be granted affiant will be able to produce said books at the next term of this court or will be able to prove their contents by the taking of depositions.

A.... B....

[Jurat.]

1905. Affidavit for continuance because of sickness of sole counsel (Rice v. Melendy, 36 Iowa, 166).

[*Proceed as in first form in this chapter to the *.*] That affiant has used due diligence to prepare for the trial of this case at the present term [*state diligence used*]. That said G.... H...., Esq., was and is his sole counsel in the case and is the only attorney conversant with the facts of the case, and that said G.... H.... was fully prepared and was relied upon by affiant to try said case at this term but that on or about the day of, 19.., said G.... H.... was taken seriously ill and has been ever since that time and now is very ill and most of the time in a delirious condition and that all conversation with him upon business matters has been prohibited by the physician in charge of the case.

That said G.... H.... has possession of all of the papers in said case including [*here state, if there are any, important documents and their nature*], and that it is and has been impossible for any other attorney to become cognizant of the facts of said case and to prepare for trial thereof at this term, because of the condition of the said G.... H...., and because of the complexity of the case and the many questions involved. That said case involves [*here state facts at length, showing any peculiar difficulty or complexity in the case and any other material facts tending to show impossibility of another attorney being able to prepare for the trial*].

That said G.... H.... is now improving in health and that affiant fully believes that if a postponement of the trial of this case be granted, said G.... H.... will be able to try the same at the next term, and that if this should be impossible affiant will be able to procure, and will procure, another attorney to try said cause.

[*Jurat.*]

C.... D....

[*Add corroborating affidavit by physician.*]

[*For case of postponement on account of other engagements of sole counsel, see McArthur v. Slauson, 60 Wis. 293.*]

1906. Motion for continuance (Iowa).

[*Title of action.*]

Now comes the defendant in the above entitled action and moves the court to continue the trial thereof to the next term of this court [*or to some stated time later in the term*], upon the affidavit of C.... D...., attached hereto and made a part hereof.

C.... D....,

[*Attach the affidavit.*]

Attorney for Defendant.

1907. Order continuing or postponing trial.¹

[Title.]

[Caption.]

On reading and filing the affidavit of C.... D...., and on motion of O.... P...., of counsel for, and L.... M...., of counsel for [or, no one appearing], in opposition:

ORDERED, that the trial of this action be postponed until the instant, on the payment within three days from date of ten dollars costs [or, to the term of this court, on the payment of costs of the present term to be taxed *instanter*,² and, *here state other terms, if any, imposed, such as*, on the defendant's consenting that the testimony of M.... N.... be taken conditionally before S.... T...., referee, on days' notice].

[Date.]

By the Court:

J.... K...., Judge.

¹ This order is very frequently simply pronounced orally from the bench in the presence of the parties and entered in the minutes. A written order, however, may be taken and may be advisable when there are conditions af-

fixed in order that there may be no doubt as to its terms.

² In Wisconsin when an act is directed to be performed *instanter* it is required to be done before the expiration of the day on which the order was made (circuit court rule XII sec. 2).

CHAPTER CXXXVII.

TRIAL BY JURY.

- | | |
|---|---|
| <p>1908. Demand for stricken jury (Wisconsin).</p> <p>1909. Affidavit accompanying demand for struck jury (Wisconsin).</p> <p>1910. Notice of striking of struck jury by clerk (Wisconsin).</p> <p>1911. General verdict.</p> <p>1912. Verdict for defendant on plaintiff's claim and on counter-claim.</p> <p>1913. Verdict for excess, both parties having proved a cause of action.</p> <p>1914. Verdict subject to opinion of the court (Wisconsin).</p> <p>1915. Verdict in replevin for the plaintiff.</p> <p>1916. Verdict in replevin for defendant.</p> <p>1917. Verdict for plaintiff in replevin (Iowa).</p> <p>1918. General verdict for plaintiff in ejectment (Wisconsin).</p> <p>1919. Separate verdict in ejectment for defendant's im-</p> | <p>provements, where plaintiff recovers the land (Wisconsin).</p> <p>1920. The same, where a part only of the plaintiffs recover (Wisconsin).</p> <p>1921. The same, for a part of the premises only (Wisconsin).</p> <p>1922. Special verdict (Wisconsin).</p> <p>1923. General verdict with findings on particular questions (Wisconsin).</p> <p>1924. Verdict in milldam action (Wisconsin).</p> <p>1925. Notice of motion for trial of issues of fact in equitable case, or issues not made by the pleadings before a jury.</p> <p>1926. Verdict in action for cutting timber, where defendant claims cutting was by mistake (Wisconsin).</p> <p>1927. Order for trial of issues in equitable action before jury.</p> |
|---|---|

1908. Demand for struck jury (Wis. Stats. 1898 secs. 2544a, 2544b).

[Title.]

To M.... N...., Esq., Clerk of Said Court:

Take notice that upon the affidavit of A.... B...., the aforementioned plaintiff, which is hereto attached, the said A.... B.... hereby demands a struck jury for the trial of this action.

Dated, 19..

A.... B....,
Plaintiff above named.

1909. Affidavit accompanying demand for struck jury (Wis. Stats. 1898 sec. 2544b).

[Title.]

[Venue.]

A.... B...., being duly sworn, says that he is the plaintiff [or the attorney, or agent of the plaintiff] in the above entitled

action; that the amount actually in controversy in said action is the sum of dollars [*the amount must be equal or exceed one thousand dollars.*]

A.... B....,

[*Jurat.*]

1910. Notice of striking of struck jury by clerk (Wis. Stats. 1898 sec. 2544b).

[*Title.*]

To the above named parties and their attorneys:

You, and each of you, are hereby notified that pursuant to the written demand of the said A.... B...., duly filed in my office, a jury for the trial of the above entitled action will be struck at my office in the city of, in said county, on the day of, 19.., at o'clock .. M., pursuant to the provisions of law.

Dated, 19..

M.... W....,
Clerk of said court.

[*To be served on both parties four days, or more, before the time fixed.*]

1911. General verdict.

[*Title.*]

We, the jury in the above entitled action, find for the plaintiff and assess his damages at dollars [*or find for the defendant*].

Dated, 19..

O.... P...., Foreman.

1912. Verdict for defendant on plaintiff's claim and on counter-claim.

[*Title.*]

We, the jury in this action, find for the defendant upon the cause of action stated in the complaint, and also find for the defendant upon his counter-claim and assess his damages thereon at dollars.

Dated, 19..

O.... P...., Foreman.

1913. Verdict for excess, both parties having proved a cause of action.¹

[*Title.*]

We, the jury in this action, find for the plaintiff on the cause of action stated in the complaint and that there is due thereon

¹ It is held in *Edleman v. Kidd*, 65 Wis. 18, that in case of an action on money demand to which a

counter-claim is interposed it is unnecessary to state in the verdict the amount due on each but

..... dollars, and we also find for the defendant on the counter-claim, stated in the answer and that there is due thereon dollars, and we assess the damages of the defendant [*or* plaintiff] at the sum of dollars, being the amount of the excess due him upon the above findings.

1914. Verdict subject to opinion of the court (Wis. Stats. 1898 sec. 2857).²

[*Title.*]

We, the jury in this action, find for the plaintiff and assess his damages at dollars [*or* for the defendant] as directed by the court, and subject to the opinion of the court upon the questions of law.

Dated, 19..

O.... P...., Foreman.

1915. Verdict in replevin for the plaintiff.³

[*Title.*]

We, the jury in this action, find for the plaintiff that he is entitled to a return of the property described in the complaint [*or describe the property recovered*] and assess the value of said property at dollars, and the plaintiff's damages by reason of the detention [*or* taking and withholding] of said property at dollars.

Dated, 19..

O.... P...., Foreman.

that a general verdict may be rendered by the jury for the balance found due to the party whose claim is found to be the larger.

² It is provided by Wis. Stats. 1898 sec. 2857, that where upon the trial *the case presents only questions of law* the court may in its discretion direct the jury to render a verdict subject to the opinion of the court. Such a verdict is only to be directed when the material facts are undisputed and only questions of law remain to be considered. It should appear either by the record or by the verdict itself that it was rendered "subject to the opinion of the court" and in that event judgment may be rendered for either party as the court determines the law to be. *Davis v. Pioneer Fur Co.*, 102 Wis. 394.

³ The verdict in replevin should

contain an assessment of the value of the property recovered and the damages suffered by the prevailing party by reason of the taking or detention (Wis. Stats. 1898 sec. 2859; Minn. Rev. Laws 1905 sec. 4181). In Minnesota the value is not to be found if the prevailing party be in possession thereof. In Iowa, when required by either party, the value of each article must be found as well as the fact which party is entitled to possession, designating and determining the value of such right or possession (Iowa Code, sec. 4175). In North Dakota and South Dakota the jury are required to find the value of specific portions of the property when so directed by the court (N. Dak. Rev. Codes sec. 5447; S. Dak. Rev. Code C. P. sec. 273).

1916. Verdict in replevin for defendant.

[Title.]

We, the jury in this action, find for the defendant, that he is entitled to a return of the property described in the complaint [*or describe the property*] and assess the value thereof at the sum of dollars, and the defendant's damages by reason of the taking, withholding and detention of the same at the sum of dollars.

Dated, 19..

O.... P...., Foreman.

1917. Verdict for plaintiff in replevin (Iowa Code sec. 4175).

[Title.]

We, the jury in this action, find for the plaintiff, that he is the absolute owner of the personal property described in the complaint [*or that he has a qualified ownership in the property described in the complaint by virtue of a levy thereon made by him as sheriff under an execution held by him against the property of or otherwise briefly describe the qualified title*]; that said property is of the value of dollars [*or is of the following value; here name each article and give its value separately*] and we assess the plaintiff's damages for the wrongful detention of said property at dollars.

Dated, 19..

O.... P...., Foreman.

1918. General verdict for plaintiff in ejectment (Wis. Stats. 1898 sec. 3084).

[Title.]

We, the jury in this action, find for the plaintiffs, that they are the owners of an estate in fee simple [*or an estate for the life of A.... B.... or otherwise specify the particular estate and its duration*] in the lands described in the complaint and have a right to recover the possession of the same, and we assess their damages for the unlawful withholding thereof at the sum of dollars, and [*if special damage be claimed in the complaint*] we further assess the plaintiffs damages for waste committed thereon at the sum of dollars.

Dated, 19..

O.... P...., Foreman.

[*If the plaintiff had title at the time the action was commenced which has terminated pending the action the verdict should state both facts and date of the termination and assess damages only to that date.*]

- 1919. Separate verdict in ejectment for defendant's improvements, when plaintiff recovers the land (Wis. Stats. 1898 sec. 3097).**

[Title.]

We, the jury in this action, find the defendant entitled to recover, upon his counter-claim herein, the value of the improvements made and taxes paid by him upon the said premises and assess the amount thereof at dollars.

O.... P...., Foreman.

[This is to be returned with the general verdict for the plaintiff but separate therefrom.]

- 1920. The same when a part only of the plaintiffs recover (Wis. Stats. 1898 sec. 3084).**

[Title.]

We, the jury in this action, find for the plaintiffs A.... B.... and C.... D.... that they are the owners, etc. [*proceed as in last preceding form to the assessment of damages*] and we assess said last named plaintiffs' damages [*proceed as in last preceding form*] and as to the plaintiffs E.... F.... and G.... H.... we find for the defendants.

Dated, 19..

O.... P...., Foreman.

- 1921. The same, for a part of the premises only (Wis. Stats. 1898 sec. 3084).**

[Title.]

We, the jury in this action, find for the plaintiff that he is the owner in fee simple [*or otherwise describe the estate as in preceding forms*] in and to a part of the premises described in the complaint, to-wit [*here describe the part recovered*], and we assess his damages [*as in preceding forms*], and as to the remainder of the premises described in the complaint we find for the defendant.

Dated, 19..

O.... P...., Foreman.

- 1922. Special verdict (Wis. Stats. 1898 sec. 2858).⁴**

[Title.]

We, the jury in this action, find the following special verdict in said action:

Question 1. [*Insert question.*]

⁴ In case a special verdict be demanded it is improper to submit a general verdict in connection therewith, and erroneous if proper

objection and exception be taken. Ward v. C., M. & St. P. Ry. Co., 192 Wis. 215.

Answer. [*Insert answer.*]

Question 2. [*Insert question.*]

Answer. [*Insert answer.*]

[*Proceed in the same manner with all of the questions.*]

Dated, 19..

O.... P...., Foreman.

1923. General verdict with findings on particular questions
(Wis. Stats. 1898 sec. 2858).

[*Title.*]

We, the jury in this action, find for the plaintiff and assess his damages at dollars [*or find for the defendant*] and we further find in answer to questions submitted by the court as follows:

Question 1. [*Insert question.*]

Answer. [*Insert answer.*]

[*Proceed as above with remaining questions.*]

Date, 19..

O.... P...., Foreman.

1924. Verdict in milldam action (Wis. Stats. 1898 sec. 3381).

[*Title.*]

We, the jury in this action, find the following special verdict in said action:

Question 1. Is the plaintiff entitled to recover damages for the maintenance of the dam described in the complaint?

Answer.

Question 2. If yes, then what is the amount of such damages, for the period commencing [three years prior to the commencement of this action down to the present time] [*or, when plaintiff's title accrued within said three years, Jan. 1st, 19.. (date when title accrued) to the present time*]?

Answer.

Question 3. [*If plaintiff alleges that the dam is of unreasonable height*]: Is the said dam raised to an unreasonable height?

Answer.

Question 4. If you answer the last preceding question "Yes" then state how much the dam should be lowered.

Answer.

Question 5. [*If plaintiff alleges that dam ought not to be closed during whole year*]: Should said dam be kept up, or closed, during the whole year?

Answer.

Question 6. If you answer last preceding question "No" then state what part of the year it shall be left open?

Answer.

Question 7. If you have answered the first question in this verdict in the affirmative, then state what sums paid annually to the plaintiff will be a just and reasonable compensation for the damages which will be hereafter occasioned by the dam so long as it is used in conformity with this verdict?

Answer.

Question 8. If you have answered the first question in this verdict in the affirmative then state what gross sum would be a just and reasonable compensation for all the damages hereafter to be occasioned by such use of the dam and for the right of maintaining and using the same forever in the manner aforesaid.

Answer.

O.... P...., Foreman.

1925. Notice of motion for trial of issues of fact in equitable case, or issues not made by the pleadings, before a jury.⁵

[*Title.*]

Take notice that upon the pleadings in this action and upon the proceedings on file [and upon the affidavit of G.... H.... herewith served] the undersigned will move the court at on the day of, 19.., at o'clock A. M., or as soon thereafter as counsel can be heard, for an order that the following issues be submitted to a jury for trial, viz.:

I. [*State the issue in succinct form.*]

[*Date.*]

G.... H....,

[*Address.*]

Attorney for Plaintiff.

1926. Verdict in action for cutting timber where defendant claims cutting was by mistake (Wis. Stats. 1898 sec. 4269).

[*Title.*]

We, the jury in this action, find generally for the plaintiff, and we further find:

I. That the cutting of timber set forth in the complaint was [or was not] done by mistake as alleged by the defendant.

⁵ The court may in its discretion order issues in equitable actions to be tried by a jury, also issues of fact not made by the pleadings. Wis. Stats. 1898 sec.

2841. In equitable actions the verdict is advisory only and the court may order a new trial or find the facts himself. *Stahl v. Gotzinger*, 45 Wis. 121; *Welch v.*

II. That the true value of such timber when so cut was the sum of dollars.

III. That the highest market value of the same [*or of the lumber manufactured therefrom*] while in defendant's possession before this trial is the sum of dollars.

L.... M...., Foreman.

1927. Order for trial of issues in equitable action before jury.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the plaintiff herein for an order submitting certain issues to a jury for trial having come on to be heard upon the pleadings herein [and the affidavit of G.... H....] and [*state any further affidavits or papers used on the motion*], after hearing G.... H...., Esq., for the motion and J.... K...., Esq., in opposition.

ORDERED that the following issue between the parties be tried by a jury at the term of the said court to be held at on the day of, 19.. [*or at the present term of this court*], viz.:

[*State issue clearly and succinctly*].

By the Court:

O.... P...., Judge.

Tippery (Neb.) 92 N. W. 582. In Minnesota any issue may by consent or order of the court, be tried by a jury. Minn. Rev. Laws 1905 sec. 4164. Such is the provision

in North Dakota, N. Dak. Rev. Codes sec. 5420; also in South Dakota, S. Dak. Rev. Code, C. P. sec. 244; and in Nebraska, Cobbe's Ann. Stats. Nebr. sec. 1264.

CHAPTER CXXXVIII.

REFERENCES AND TRIAL BY REFEREES.

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| 1928. Affidavit by plaintiff to move for reference of an action involving a long account. | presented on reference (Wisconsin). |
| 1929. The same, by defendant. | 1947. Order that books and papers be deposited with referee before accounting. |
| 1930. Notice of motion to refer cause. | 1948. Oath of referee. |
| 1931. Order to show cause why reference should not be ordered. | 1949. Oath of referee (Minnesota). |
| 1932. Affidavit to oppose motion, denying account. | 1950. Oath of reference (Iowa and Nebraska). |
| 1933. Affidavit to oppose motion, where fraud is set up. | 1951. The same (North Dakota). |
| 1934. Affidavit to oppose motion, where there are difficult questions of law. | 1952. The same (South Dakota). |
| 1935. Stipulation to refer. | 1953. Appointment of first meeting, by referee. |
| 1936. Order referring the cause on motion. | 1954. Notice of hearing or trial, by party. |
| 1937. Order referring the cause, without motion. | 1955. Report of referee, general form. |
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| 1940. Order of reference to take testimony as to the value of use and occupation, in action for specific performance. | 1958. Referee's report as to priority of creditors. |
| 1941. Order of reference to take an account as to damages. | 1959. Notice of claim to surplus in foreclosure (Wisconsin). |
| 1942. Order of reference to take an account between parties to a mortgage, in an action to redeem. | 1960. Affidavit to move for reference of claim to surplus in foreclosure. |
| 1943. Order of reference for accounting in partnership cause. | 1961. Notice of motion for reference, to obtain surplus moneys on foreclosure sale. |
| 1944. Order of reference to determine priority among creditors. | 1962. Order of reference of claims to surplus moneys. |
| 1945. Order of reference to take all testimony and report to the court. | 1963. Referee's report thereon. |
| 1946. Plaintiff's account, to be | 1964. Notice of motion for payment. |
| | 1965. Order distributing surplus moneys in foreclosure. |
| | 1966. Notice of filing report of referee. |
| | 1967. Exceptions to report. |
| | 1968. Motion to confirm report of referee and for judgment. |

1969. Motion for further report.

1970. Motion to set aside report
and for a new trial.1971. Order confirming, setting
aside, or amending referee's report.

While the statutes of the various states differ in detail with regard to the ordering of references, they substantially agree upon the following general propositions. A reference may be ordered to try any or all of the issues upon consent of the parties; it may also be compulsorily ordered (1) where it appears that a long account must necessarily be examined upon either side, (2) where the taking of an account is necessary for the information of the court, and (3) where a question of fact other than upon the pleadings arises in the action. Wis. Stats. 1898 sec. 2864 as amended by Laws 1905 c. 146; Minn. Rev. Laws 1905 sec. 4191; Iowa Code sec. 3735; N. Dak. Rev. Code secs. 5455, 5456; S. Dak. Rev. Code C. P. secs. 281, 282; Cobbey's Ann. Stats. of Nebr. 1282, 1283.

1928. Affidavit by plaintiff to move for reference of an action involving a long account.¹

[*Title.*][*Venue.*]

A.... B...., the plaintiff in the above-entitled action, being duly sworn, says:

That said action is brought to recover [*here briefly designate nature of cause of action, as for instance*]: for goods, wares and merchandise sold and delivered by plaintiff to defendant, at his request, at various times between the day of, 19.., and the day of, 19.., as more fully appears from the complaint herein.

That issue was joined on [*or, as of*] the day of, last, by the service of defendant's answer, setting up [*here designate the defences,—e. g., thus*] payment as to part, and a counter-claim arising out of several items of services alleged to have been rendered by him to the plaintiff.

That the trial of the aforesaid issue will require the examination of a long account on the side of the plaintiff [*or, defendant, or, both parties*], consisting of at least items of charges and [credits] of the aforesaid [goods and services] of various dates.

A.... B....

[*Jurat.*]

¹ The affidavit should be made by a party or excuse be stated in it. Wood v. Crowner, 4 Hill, 548.

Joinder of issue should be stated. Jansen v. Tappen, 3 Cowen, 34.

1929. The same, by defendant.[*Title.*][*Venue.*]

C.... D.... being first duly sworn says that he is the defendant in this action; that the same is brought by the plaintiff on an account for goods, wares and merchandise, alleged to have been heretofore sold and delivered to this defendant; that issue was joined herein on the day of, 19.., by the service of the defendant's answer, in which the defendant denies the sale and delivery of a part of the said goods and merchandise and alleges payment as to the balance thereof and also alleges as a counter-claim that the plaintiff is indebted to this defendant upon an account for work, labor and services rendered.

That by the bill of particulars of the plaintiff's claim heretofore served herein, the same contains items, all of which [*or state how many*] this defendant, by his answer, controverts.

That the items of this defendant's counter-claim embrace an account of separate items, and that the trial of this issue will require the examination of a long account, namely, the said account of the said plaintiff, and also of this affiant as aforesaid.

That no difficult questions of law are, to the best of this affiant's knowledge and belief, involved in the said issues in this action.

C.... D....

[*Jurat.*]**1930. Notice of motion to refer cause.**[*Title of the cause.*]

Please take notice, that on [*designate papers*], the undersigned will move the court, at a term to be held at, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, that this action be referred to a referee [*or to three referees*] to hear, try and determine the same.

[*Date.*]

L.... M....,
Plaintiff's Attorney.

To O.... P...., Esq.,
Defendant's Attorney.

1931. Order to show cause why reference should not be ordered.[*Title.*]

Upon the affidavit of A.... B...., and on reading the pleadings on file herein, and on motion of L.... M...., Esq., attorney for defendant,

ORDERED, That the herein show cause, at the court house in the city of in said county, on the day of 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, why the order of reference applied for herein should not be granted;

That a copy of this order and said affidavit be served on the plaintiff's attorney, at least hours before the time fixed for the hearing of such motion.

O.... P....,
Circuit Judge.

1932. Affidavit to oppose motion, denying account.

[*Title.*]

[*Venue.*]

C.... D.... being duly sworn says that he is the defendant in this action and that the issue joined herein will not require the examination of a long account within the meaning of the statute.

That this action is brought to recover for a bill of goods sold by plaintiff to defendant; and that all of said goods were sold at one time, and as one transaction, and the alleged credit is a payment made by defendant at said time, and then deducted from the amount to be due from defendant to the plaintiff; and there are no other items of charge or credit involved in the issues herein.

C.... D....

[*Jurat.*]

1933. Affidavit to oppose motion, where fraud is set up.

[*Commencement as in last preceding form*] that this action is brought upon an insurance policy alleged to have been made by defendants; and that the only items of account are the items of damage, which plaintiff claims he has sustained by a peril insured against.

That the defence [*or, one of the defences*] set up by the defendants is fraud on the part of the plaintiff, in [*here briefly disclose it*], as more fully appears by reference to their answer herein.

C.... D....

[*Jurat.*]

1934. Affidavit to oppose motion, where there are difficult questions of law.²

[*Commencement as in preceding forms*] that he has fully and fairly stated the case in this cause to his counsel O....

² Where an action contains important issues requiring the discretion, experience and judgment of the court it should only be re-

ferred "to take an account for the information of the court." *Druse v. Herter*, 57 Wis. 644.

P...., who resides at No., ... street, in the city of; and that the investigation and trial of the issues of fact in this cause will, as deponent is advised by said counsel, after such statement, and believes, require the decision of difficult questions of law.

That [*here state, unless the moving affidavits correctly state it, the nature of the issue, and that*] the following will be insisted on on behalf of said plaintiff [*here briefly state deponent's points of law*]. And deponent is informed and believes that the defendant's counsel will urge [*here briefly state his anticipated points*]; which points, as deponent is advised by his said counsel, are material to the cause, and are difficult, especially in their application to the facts of this case.

C.... D....

[*Jurat.*]

1935. Stipulation to refer.

[*Title.*]

It is hereby stipulated and agreed by the parties to this action [that the right of trial by jury be waived, and that] it be referred to R.... F...., Esq., of, counsellor-at-law, to hear, try and determine the issues in this cause; and that an order may be entered accordingly.

[*Date.*]

A.... B...., Plaintiff's Attorney.

C.... D...., Defendant's Attorney.

1936. Order referring the cause on motion.

[*Title.*]

On reading and filing [the pleadings and the affidavit of G.... H....], and on motion of M.... N...., counsel for defendant, and after hearing O.... P...., counsel for plaintiff [*or, and on proof of service of notice of motion, and no one appearing*], in opposition:

ORDERED, that it be referred to R.... F...., Esq., of, counsellor-at-law, to hear, try and determine the whole issues in this cause.

[*Date.*]

By the Court: 1

L.... M...., Judge.

1937. Order referring the cause, without motion.

[*Title.*]

This cause coming on to be tried, and it appearing to the satisfaction of the court that it will require the examination of a long account:

ORDERED [*as in preceding form*].

1938. Order of reference upon written stipulation.

[Title.]

On reading and filing the annexed consent, and on motion of M.... N.... for plaintiff [*or, defendant*]:

ORDERED [*as in last preceding form*].

1939. Order of reference (Iowa).

[Title.]

[*Commencement as in preceding forms of orders of reference, or if parties have orally agreed in open court*] the parties to this action having orally agreed in open court that the same be referred to the person [*or persons*] hereinafter named to hear, try and determine the same,

ORDERED that said action be and the same hereby is referred to R.... F.... and R.... E...., referees, to hear, try and determine all the issues therein and to report at this [*or the next*] term of this court, and that the cause be heard at upon ten day's written notice [*or commencing on the day of , 19..*]

[Date.]

By the Court:

L.... M...., Judge

1940. Order of reference to take testimony as to the value of use and occupation in action for specific performance.

[Title.]

[Caption as in Form 7.]

ORDERED, after hearing counsel for the plaintiffs and defendants, that it be referred to R.... F...., Esq., to take such testimony as may be produced before him by either party to this cause in relation to the value of the use and occupation, by C.... D...., of the premises [*briefly designating them*], since the day of, 19.., and the amounts received and collected by C.... D...., or which, with reasonable diligence, might have been received and collected for the same since said day, the amounts expended by said C.... D.... for taxes, assessments, repairs, or otherwise, in and upon said premises [*and also in relation to all policies of insurance upon said premises, and as to any actions brought upon the same*].

And it is further ordered, that the said referee report said testimony with all convenient speed.

1941. Order of reference to take an account as to damages.

[Title.]

[Caption as in Form 7.]

This cause coming on to be tried, and it appearing that the taking of an account is necessary for the information of the court

before judgment; thereupon, on hearing counsel for the respective parties,

ORDERED, that it be referred to R.... F...., Esq., as sole referee, * to ascertain and report [the amount of wharfage which should be allowed to the plaintiffs for the breach of the covenant by the defendants, contained in the grant mentioned in the pleadings]. And for such purpose he is to ascertain [*etc., specifying the principles on which the account is to be taken*]. And he is to compute the interest on such amount, and state the same in his report.

And upon such report being confirmed according to the practice of this court either party may bring on the cause for final judgment.

1942. Order of reference to take an account between parties to a mortgage, in an action to redeem.

[*As in preceding form to the *, continuing*]: to take and state an account between the several parties to this action, in the manner and under the directions following, to-wit:

That he compute the amount due upon the bond and mortgage executed by the plaintiff to the defendant, Z...., mentioned in the complaint, from the day of, 19.., down to which time the interest appears to have been paid.

That he ascertain [from the deeds or otherwise] the consideration paid by the purchasers and defendants, X.... and Y...., from the said Z...., at the auction sale of the said premises made on the day of, 19.. [*proceeding to state the mode of apportioning the redemption money among them*].

That he open and state an account with each of such defendants, in which he is to allow such party his proportion of the mortgage money so ascertained as aforesaid, with interest; and also all taxes and assessments paid by him or those under whom he claims, upon the lots now held by him; and also any sum paid for necessary repairs upon the same, and any amount expended for lasting improvements, with interest on such sums respectively; and that he state and charge such party with any rents and profits of such lots received by him, or those under whom he claims, or by any one on his or their behalf, or which could have been received without wilful default, with interest.

And upon the coming in and confirmation of the report, the action may be brought on for final determination.

1943. Order of reference for accounting in partnership cause.

[*As in Form 1941 to the *, continuing*]: to take and state an account of all dealings and transactions between the plaintiff

and defendant, as partners, under the style of A.... B.... & Co.; and for the better taking and stating of which account the parties are to produce before the said referee, under oath, all books, deeds, papers, and writings in their custody, or under their control, relating thereto; and are to be examined upon interrogatories or otherwise, as the said referee shall direct, who, in taking the said account, is to make all just allowances to the parties as between themselves; and what, on the balance of the said account, shall appear to be due from either party to the other, is to be paid as the said referee shall direct; and the referee is at liberty to state and report any special circumstances, as well as his reasons for allowing or disallowing any allowances which may be claimed.

And it is further ordered, that the question of costs, as well as all other questions, are reserved until the coming in of the report and hearing for further directions.

1944. Order of reference to determine priority among creditors.

[*As in Form 1941 to the *, continuing*]: to ascertain and report who are the creditors of the said firm of A.... B.... & Co., and the amounts due to said creditors respectively, and the order in which they are entitled to payment out of the assets of the said firm of A.... B.... & Co. [in conformity with the provisions of the statute of limited partnerships].

That any party to this action, or any person claiming to be a creditor of said firm, and presenting to the said referee *prima facie* evidence of his claim, shall have the right to contest any claim preferred by any other creditor, and that testimony may be taken before said referee on the part of the claimants and contestants. That the said referee report to this court the names of the creditors, and the amounts found by him to be due to each respectively, and the order in which they are entitled to payment; and that in case any of said claims be contested, the said referee do report the facts relative to the claim so contested, and the grounds of objection alleged by the contestant, and the decision of the said referee thereupon.

And it is further ordered, that on the coming in of the referee's report, any party to this action, or any creditor whose claim is allowed by the referee, may apply to this court for an order for the final distribution of the balance of the funds in the hands of the receiver herein, among the creditors of said firm as ascertained by said report, or by the order of the court thereupon.

And it is further ordered, that either party, or any creditor, may apply to this court, from time to time, for further directions in the premises.

1945. Order of reference to take all testimony and report to the court.

[*Title.*]

[*Caption as in Form 7.*]

This action coming on for trial, after hearing G.... H...., Esq., for the plaintiff and J.... K...., Esq., for the defendant,

ORDERED, that it be referred to L.... M...., Esq., as sole referee to take the testimony in said action and that he report the same to this court with all convenient speed.

1946. Plaintiff's account, to be presented on reference.

[*Title.*]

Statement of mutual accounts between the plaintiff and defendant as partners, under the name of A.... B.... & Co. [since last balance and settlement had between them on the day of, 19..]

[*Here state items, e. g., thus*]:

A.... B.... IN ACCOUNT WITH Y.... Z.... IN RESPECT TO SAID
PARTNERSHIP TRANSACTIONS.

DR.	CONTRA.	CR.
19..	19..	
Jan. 15.—To cash received at that date on partnership note of F.... P.... and not entered on firm books.\$....	Jan. 1.—By balance due said A.... B.... on settlement of partnership accounts and transactions up to date, as appears by partnership books of account deposited with referee....\$....	
May 5.—To one-half merchandise account charged to account of plaintiff, as appears by the firm books deposited with referee....\$....	Interest thereon to date..\$....	
	Feb. 3.—By cash, etc.\$....	

[*Venue.*]

A.... B...., the above-named plaintiff, being duly sworn, says that the foregoing account, and the said several accounts and entries embraced in the settlement of the day of, 19.., upon the partnership books herewith deposited with the referee in this action, including both debits and credits, are correct; according to the best of deponent's knowledge, information, and belief, and this deponent does not know of any error or omission in said account to the prejudice of his said co-partner, the defendant.

A.... B....

[*Jurat.*]

1947. Order that books and papers be deposited with referee before accounting.

[Title.]

[Caption as in Form 7.]

On reading and filing the affidavit of A.... B...., the plaintiff [*or*, on the petition of C.... D...., *or*, on the certificate of the referee] herein, dated the.... day of, 19.., and on motion of M.... N...., for the plaintiff, and on hearing O.... P...., for the defendant [*or*, and on proof of due service of notice of this motion and no one appearing], in opposition,

ORDERED, that the defendant Y.... Z...., within [four] days after personal service hereof, on said defendant, or on his attorneys, produce before the said referee, under oath, all [*here specify the writings*] in his custody or power, relating to the matters in question; or, in default thereof, that, on the referee's certificate of such default, an attachment issue to the sheriff of the county of, to take the said defendant into custody and bring him before this court to answer for the contempt.

1948. Oath of referee.³

[Title.]

[Venue.]

I [E.... F....], having been appointed referee in this action [to try the issues in this action] [*or*, for the purposes in said order mentioned], do solemnly swear [*or*, affirm] that I will faithfully discharge my duties as such referee to the best of my ability, so help me God [*or in case of affirming* and this I do under the pains and penalties of perjury].

E.... F....

[Jurat.]

1949. Oath of referee (Minn. Rev. Laws 1905 sec. 2678).

[Title.]

[Venue.]

I, E.... F...., do swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as the referee appointed in this action to hear and determine this action wherein N.... B.... is plaintiff and C.... D.... defendant and make a just and true report therein to the best of my ability, so help me God.

E.... F....

[Jurat.]

³ A referee should take an oath for the faithful performance of his duties whether specifically required by statute or not. It will, however, be presumed that he

took the oath if nothing appears in the record to the contrary. *Gilbank v. Stephenson*, 31 Wis. 592. This form is doubtless sufficient in Wisconsin.

1950. Oath of referee (Iowa Code sec. 3745; Cobbey's Ann. Stats. of Nebr. sec. 1289).

[Title.]

[Venue.]

I, R.... F...., the referee [*or if more than one, We, naming them, the referees appointed in this action*], do hereby solemnly swear that I *or* each for ourselves, that we] will well and faithfully hear and examine said cause, and make a just and true report therein according to the best of my [*or our*] understanding, so help me God.

[Jurat.]

R.... F....

1951. The same (N. Dak. Rev. Codes sec. 5461).

[*Commencement as in last preceding form*] will well and truly hear and determine the facts referred as aforesaid and true findings render according to the evidence, so help me God.

1952. The same (S. Dak. Rev. Code C. P. sec. 284).

[*Commencement as in last preceding form*] will well and truly try the issues in said action [*or where specific questions are referred, will well and truly determine the questions referred*] and make a just and true report according to the best of my [*or our*] knowledge and understanding, so help me God.

1953. Appointment of first meeting, by referee.

[Title.]

The undersigned referee[s] herein, hereby appoint the day of next, at o'clock in the noon, at the office of, No., ... street, in the city of, for the trial of this action.

[Date.]

R.... F...., Referee.

1954. Notice of hearing or trial, by party.

[Title.]

Take notice, that this action will be brought to a hearing before R.... F...., referee herein, at his office No., ... street, in the city of, on the day of next, at o'clock in the noon.

[Date.]

A.... B....,
Plaintiff's Attorney.

[Address.]

1955. Report of referee, general form.

To the Court for County:

Pursuant to the order of reference made in this action on the day of, 19.., I, the undersigned, as such referee, respectfully report that having taken the oath required by law as

such referee, I appointed the day of, 19.., as the time, and my office in the city of, as the place, for the trial of said action, and duly gave each party notice of the time and place of such trial.

That on said day the trial was commenced and then continued from day to day until the day of, on which it concluded, A.... B...., Esq., appearing for the plaintiff and C.... D...., Esq., for the defendant.

[That upon the opening of the case the defendant moved to dismiss the action on the ground that the complaint stated no cause of action, which motion I denied and to which ruling the defendant excepted.]

[That, thereupon the plaintiff moved for leave to amend his complaint, which leave was granted, and the defendant excepted thereto and a copy of said amendment is hereto attached.]

The testimony taken before me is hereto annexed, marked exhibit A, and made part of this report, and the exceptions and rulings therein are stated in said evidence, as they were taken.

And I further report that after argument of counsel, being now fully advised in the premises, I hereby make and report the following findings of fact in said action:

I. [*Here state facts found separately as in a finding by the court.*]

And as conclusions of law I find as follows:

I. [*Here state legal conclusions separately.*]

And that the plaintiff is entitled to judgment as follows [*here state judgment which should follow findings.*]

[*Date.*]

Respectfully submitted,

[*Attach statement of fees.*]

M.... N...., Referee.

1956. Report in partnership cause.

[*Commencement as in last preceding form.*]

I find, as Conclusions of Fact:

I. That from the day of, 19.., to the day of, [when this action was commenced], the parties hereto were partners in the business of, at, [under articles of agreement set forth in the complaint herein].

II. That the defendant in the month of, took exclusive possession of the partnership assets and books, and then, and ever since, prevented the plaintiff from having free access thereto, and obstructed his use and control thereof.

I find, as Conclusions of Law:

I. That the plaintiff is entitled to a judgment declaring said partnership dissolved as of the day of, 19..

II. That the plaintiff is entitled to an accounting with the defendant in respect to the partnership dealings, and the use made of the partnership property by the defendant.

III. That on such accounting the plaintiff is entitled to have allowed to him [*here set forth the principles on which the accounting should be taken*]

[*Date.*]

M.... N...., Referee.

1957. Referee's report on accounting in partnership cause.

[*Title.*]

To the Court of

Pursuant to an order of this court, in this action, dated the day of, 19..; I, the undersigned referee report: * That having been attended by the attorneys for the several parties who appeared in this action, I proceeded to a hearing of the matter so referred. I further report, that on such hearing, the books, deeds, papers, and vouchers of the said partnership having been produced before me, the defendant rendered his [*or, both parties rendered their respective*] accounts, which are hereto annexed, and marked Schedule A.

II. That I examined said defendant, and also X.... Y...., concerning the transactions aforesaid, and adjusted a mutual account between the plaintiff and defendant, making therein all just allowances, and striking a balance which shows what appears to be due from either party to the other, which said account is hereto annexed, and marked Schedule B.

III. That said defendant owes to said partnership, at this date, the sum of dollars, with interest from the day of, 19.., at the rate of per cent. per annum, amounting to dollars which sum I have allowed.

IV. That the balance shown by said Schedule B, after defendant has made good to said partnership said sum, belongs to plaintiff and defendant in equal shares [*or, in the following proportions, stating them*].

[*Date.*]

O.... P...., Referee.

1958. Referee's report as to priority of creditors.

[*As in preceding Form, to the *, continuing*]:

That I have been attended upon such reference by counsel for the plaintiff and for the defendants, and for M.... N.... and O.... P...., creditors of said firm of Y.... Z.... & Co.

That upon being served with a copy of the said order, I caused notice to be published [*twice a week, for three weeks, in two*]

daily newspapers of the city of New York, one published in the morning and one published in the afternoon], requiring all persons having any claim against the said firm, to produce and prove the same before me at a place in said city, and by a time therein specified; copies of which notice, with affidavits of the publication thereof, are hereto annexed, marked Schedule No. 1 and Schedule No. 2.

That I also obtained from the defendant, W.... X..., a list of the outstanding creditors of the said firm, made up by him while acting as assignee thereof, and which he testified was correct, to the best of his knowledge, information, and belief; and I caused duplicates of the said notice to be served upon all of such creditors, either personally or by being left at their places of business, or when such creditors were a firm now dissolved, to be served as aforesaid upon one of the members of such creditor-firm.

II. I further report, that the creditors of the said firm of Y.... Z.... & Co., and the amounts at the date of this my report, found due to them, respectively, are as follows [*designating names and amounts*].

III. I further report, that of the said creditors, M.... N.... above mentioned, is entitled to be preferred to all the others to the extent of dollars, being the amount [*specifying nature of claim and grounds of preference*]. That except as to the said sum of dollars, all the said creditors, including the said M.... N...., are entitled to be paid ratably and proportionably out of the assets of the firm of Y.... Z.... & Co., and that neither ought to be postponed to any other in whole or in part, except as aforesaid.

IV. I further report, that one and one only of the said claims is contested by either party, or by any creditor, namely, the said claim of O.... P....; that the facts relative to the said claim are as follows [*stating the facts, and continuing*]; and that I found the facts in respect thereto to be as above stated and decided, and do report that by virtue of the facts above stated, the said O.... P.... has a valid claim against the said Y.... Z.... & Co., for the amount above seventhly mentioned in the second article of this my report, being the sum of dollars, with interest thereon from the said day of, 19..

1959. Notice of claim to surplus in foreclosure (Wis. circuit court rule XXV and sub. 4).

[*Title of the cause.*]

Take notice, that the undersigned is entitled to the surplus moneys, or a part thereof, arising on the sale made in this ac

tion, on the day of, instant [*here state the nature and extent of the claim,—e. g., thus*]: The claim of the undersigned is for dollars, and interest thereon, from the day of, 19.., by virtue of a lien under a judgment against [*or, mortgage given by*] the defendant Y.... Z...., while the said Y.... Z.... was the owner of the equity of redemption in the mortgaged premises, and before the commencement of this action [*or, by virtue of his being the owner of the equity of redemption in the mortgaged premises*], which lien is next in priority after the mortgage of the plaintiff in this action. [Date.]

[Signature.]

[Address to clerk of court with whom it should be filed.]

1960. Affidavit to move for reference of claim to surplus in foreclosure.

[Title.]

[Venue.]

W.... X.... [one of the defendants in this action], being duly sworn, says:

That this action was brought to foreclose a mortgage on real property; that judgment has been entered in said action, as this deponent is informed and believes, and that a sale has been made of the mortgaged premises under the direction of the court, and that the claim of the plaintiff in the action has been paid; and there remains a surplus of about dollars over and above the money due on said mortgage and costs of this action, which surplus has been brought into this court subject to the order thereof.

That deponent has a claim on the said surplus moneys amounting to dollars; which claim consists of a judgment obtained in this court, on the day of, 19.., against Y.... Z.... [*or, a mortgage made on, etc., by Y.... Z....*], then the owner in fee of the mortgaged premises [*or, which claim arises by virtue of the fact that he was the owner of the equity of redemption in the mortgaged premises*].

W.... X....

[Jurat.]

1961. Notice of motion for reference to obtain surplus moneys on foreclosure sale.

[Title.]

TAKE NOTICE that upon the annexed affidavit of W.... X.... and upon the pleadings and proceedings on file in this action the undersigned will move the court on the

day of, 19.., at o'clock A. M. or as soon thereafter as counsel can be heard, that it be referred to R.... F...., Esq., of, to ascertain and report the amount due the said W.... X...., or to any other person, which is a lien upon such surplus moneys, and as to the priority of the several liens thereon, and for such other relief as may be just.

[Date.]

M.... N....,

Attorney for said W.... X....

[Addressed to every party who has appeared or filed notice of claim.]

1962. Order of reference of claims to surplus moneys.

[Title.]

[Caption as in Form 7.]

On reading and filing notice of claim, by W.... X.... to surplus moneys in this action, and on motion of M.... N.... for the said W.... X...., and O.... P.... having been heard for [or, and on reading and filing proof of due service of notice of this application on] all the parties who have appeared or who have served notice of claim of such moneys, in opposition:

ORDERED, that it be referred to R.... F...., Esq., of, as a referee, to ascertain and report the amount due the said W.... X...., or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; and that the said referee report thereon with all convenient speed.

1963. Referee's report thereon.

[As in Form 1957 to the *, continuing]:

I caused all the parties who have appeared in this action, and all persons having filed notice of claim upon such surplus moneys, to be summoned to appear before me; as appears by the certificate of the clerk, showing what notices of claim have been filed, and by the summons and proof of service, which are annexed and marked schedule A. And that on the hearing, I was attended by M.... N.... for W.... X...., and by O.... P.... for the defendant Y.... Z....

The amount of such surplus moneys is dollars, as appears by the certificate of the clerk of this court hereto annexed as schedule B.

[Then set forth the claims, the evidence or facts proved, and any objections interposed, and then the conclusion of the referee, e. g., thus:]

And I find the foregoing facts, and from the facts so found, I report that said W.... X...., under and by virtue of the sheriff's deed to him, is the owner of the equity of redemption of

said premises, and as such owner, he is entitled to the whole of said surplus moneys, and that there is no lien or claim thereon prior to the lien and claim of said W.... X....

[*Date.*]

R.... F...., Referee.

1964. Notice of motion for payment.

[*Title.*]

TAKE NOTICE that the referee's report as to the surplus moneys in this cause, with a copy whereof you have been served, will be presented to this court at a special term thereof, to be held at the court-house in, on the day of next, at the opening of the court on that day or as soon thereafter as counsel can be heard, and a motion will then and there be made for an order [confirming said report, and] that the clerk of this court pay to the defendant, W.... X...., or his attorney, the whole [*or*, ... dollars] of the surplus moneys in this cause deposited with him, and for such further or other relief as may be just, with costs.

[*Date.*]

M.... N....

[*To all parties and claimants to the fund who have appeared.*]

1965. Order distributing surplus moneys on foreclosure.

[*Title.*]

[*Caption as in Form 7.*]

[*Recite reference and report substantially as in Form 1971, infra, and continuing*]:

IT IS ORDERED that said report be, and the same is, hereby in all things confirmed, and that the clerk of this court, upon the filing of this order, be and he is hereby directed to pay, out of the surplus moneys remaining in his hands to the credit of this action, to the persons named below the sums set opposite their respective names and in the order named.

I. To W.... X...., the sum of dollars [*follow with others if any*].

By the Court:

O.... P...., Judge.

1966. Notice of filing report of referee.*

[*Title.*]

SIR: Please take notice that on the day of, 19.., M.... N...., the referee appointed to try the issues herein, filed in the office of the clerk of said court his report, and that a copy of his findings of fact and conclusions of law as con-

* Wis. Stats. 1898 sec. 2871; N.Dak. Rev. Code, sec. 5466.

tained in said report are hereto annexed and herewith served on you.

[Date.]

O.... P....,

Attorney for

To [Address],

Attorney for

1967. Exceptions to report.⁶

[Title.]

And now comes the plaintiff [*or* defendant] and excepts to the report of M.... N...., referee in said action, dated, 19.., as follows:

I. He excepts to the first finding of fact in said report contained [*or if the exception be to a part of the finding*] to that part of the first finding of fact which reads as follows [*insert part excepted to*].

II. [*Proceed in same way as to other findings excepted to.*]

III. [*If the exception be based upon a failure to find as to any specific fact*]: He excepts to the said report for the reason that the said referee failed to find [*here state fact omitted*].

[Date]

O.... P....,

Plaintiff's [*or*, Defendant's] Attorney.

1968. Motion to confirm report of referee and for judgment.

[*The object of the motion may be stated thus after formal parts*]: that the said report and the findings of facts and conclusions of law therein be confirmed by the court and that judgment for the plaintiff [*or* defendant] be rendered according to the recommendations of said report.

[Date.]

O.... P....,

Plaintiff's [*or*, Defendant's] Attorney.

1969. Motion for further report.

[*The object of the motion may be stated thus after formal parts*]: that M.... N...., the referee in this action, be required to make a further report herein stating [*his findings of fact and conclusions of law separately, or, his finding upon the question here briefly state question*].

⁶ Exceptions must be filed to the finding of the referee in order to entitle the party objecting to a review of the findings by the court. Wis. Stats. 1898 sec. 2871; Iowa Code sec. 3740; N. Dak. Rev.

Code sec. 5466; S. Dak. Rev. Code C. P. sec. 288; Cobbey's Ann. Stats. of Nebr. sec. 1284; State v. Standard Oil Co., 63 Nebr. 95 s.c. 88 N. W. 780.

1970. Motion to set aside report and for a new trial.⁶

[Title.]

SIR: Please take notice that upon the report of O.... P...., Esq., the referee herein, heretofore filed and upon the pleadings and papers on file in this action [and the affidavits of E.... F.... and G.... H...., of which copies are herewith served on you], the plaintiff [*or*, defendant] will move the court, on the day of, 19.., at the court house in the city of, in said county, at the opening of the court on that day or as soon thereafter as counsel can be heard, for an order vacating and setting aside the said report of the referee and directing a new trial of the issues in this action.

[Date.]

To [Address],

....., Attorney.

M.... N....,

....., Attorney.

1971. Order confirming, setting aside, or amending referee's report.

[Title.]

This cause coming on to be heard on the day of, 19.., upon the motion of A.... B...., the plaintiff [*or*, defendant] to [confirm the report of O.... P...., Esq., referee herein] [*or*, to alter the report of O.... P...., referee herein], [*or*, to modify the report of O.... P...., referee herein], [*or*, to set aside the report of O.... P...., referee herein]; and said motion having been heard upon the pleadings, the evidence taken and the findings of said referee and the [*here specify any other papers that may have been used upon the motion*] and after hearing G.... H...., Esq., for the, for the motion, and L.... M.... in opposition, and being advised in the premises:

ORDERED, that the said report of the referee herein be and the same is hereby confirmed, and that judgment be entered in accordance therewith, to-wit [*here specify the judgment to be entered*] *or*:

ORDERED, that the said report be altered and modified in the following respects, to-wit [*here specify the alteration or modification*], and that judgment be entered upon the same as so altered and modified, to-wit [*here specify the substance of the judgment ordered*], *or*:

⁶ Wis. Stats. 1898 sec. 2865 as amended by Laws 1905 c. 146; Minn. Rev. Laws 1905 sec. 4193; N. Dak. Rev. Code sec. 5466; S.

Dak. Rev. Code C. P. secs. 289, 290; Cobbeys Ann. Stats. of Nebr. sec. 1284.

ORDERED, that the said report be and the same is hereby set aside [and that a trial by the court of the several issues so referred be had], *or*:

ORDERED, that said report be referred back to said referee who is directed to amend the same in the following respects, namely [*here specify the nature of the amendments directed*].

By the Court:

J.... K...., Judge.

CHAPTER CXXXIX.

TRIALS BY THE COURT.

- | | |
|---|--|
| 1972. Written stipulation waiving jury trial. | 1975. The same, in an action upon an inn-keeper's liability. |
| 1973. Finding by the court, general form. | 1976. Request for findings. |
| 1974. Findings in an action on a promissory note. | 1977. Exceptions to the findings. |
| | 1978. Notice of filing of the decision. |

1972. Written stipulation waiving jury trial.¹

[*Title.*]

It is hereby stipulated by the parties that trial by jury be waived and that the same be tried by the court [at the term of the court for county, notice of trial being hereby waived].

[*Date.*]

G.... H...., Plaintiff's Attorney.
J.... K...., Defendant's Attorney.

1973. Finding by the court, general form.²

[*Title.*]

This action coming on for trial at the term of said court and having been tried before the court [a jury trial having been waived] on the day of, 19.., G.... H...., Esq., appearing for the plaintiff, and J.... K...., Esq., for the defendant; and after hearing the allegations and proofs of the parties, the arguments of counsel, and being advised in the premises,

¹ As a general rule trial by jury may be waived also by failing to appear in the action and by oral consent of the parties in open court entered on the minutes.

² Upon the trial of any issue by the court the decision must be in writing stating the facts and conclusions of law separately. Wis. Stats. 1898 sec. 2863; Minn. Rev. Laws 1905 sec. 4185; N. Dak. Rev. Codes secs. 5450, 5451; S. Dak. Rev. Code C. P. secs. 276, 277. In

Iowa findings of fact are only necessary in actions at law, and then only when requested by one of the parties. Iowa Code secs. 3652, 3654. In Nebraska a general finding for plaintiff or defendant is sufficient unless one of the parties requests separate findings. Cobbey's Ann. Stats. of Nebr. sec. 1281. In Wisconsin the general finding stating that all the allegations of the complaint are true is not considered a finding of any-

I hereby make and file the following findings of fact and conclusions of law constituting my decision in said action:

FINDINGS OF FACT.

- I. That [*here state the facts found separately and concisely*].
- II. That, etc.

CONCLUSIONS OF LAW.

- I. That [*here specify the same*].
- Let judgment be entered accordingly.
[*Date.*]

By the Court:

O.... P...., Circuit Judge.

1974. Findings in an action on a promissory note.^a

[*Commencement as in last preceding form.*]

FINDINGS OF FACT.

I. That at the time of making the note hereinafter mentioned, the plaintiff, and one C.... D...., were partners in business, under the firm-name of A.... B.... & Co.

II. That on the day of, 19.., at, the defendant made his promissory note in writing, dated on that day, and thereby promised to pay to the plaintiff and C.... D...., under said firm-name, ... dollars, in months after said date.

III. That no part thereof has been paid.

IV. That on the day of, 19.., at, said C.... D.... died leaving the plaintiff sole surviving partner of said firm.

CONCLUSIONS OF LAW.

I. That the cause of action against the defendant survived to the plaintiff on the death of C.... D....

II. That the defendant is indebted to the plaintiff on said note for dollars.

Let judgment be entered for the plaintiff in the sum of dollars, with costs.

M.... N...., Judge.

specific fact. *Burke v. Lidra Bay Co.*, 116 Wis. 137; *McKenzie v. Haines*, 123 Wis. 557 s.c. 102 N. W. 33.

^a This and the following forms are merely suggestive. The *desideratum* in a finding of fact is

that each ultimate material litigated fact be stated separately and concisely and that the conclusions of law necessary to support the judgment be stated in the same way.

1975. The same, in an action upon an inn-keeper's liability.

[Commencement as in preceding form.]

FINDINGS OF FACT.

I. That on the day of, 19.., the defendant was a common inn-keeper at the town of, in this state.

II. That on said day the defendant received and entertained the plaintiff as a guest at his inn, for hire.

III. That the inn of the defendant was upon the seashore, and in connection with it the defendant maintained bathing-houses for the safekeeping of the clothing, wardrobe, and such money and jewelry of his guests as are usually carried upon the person of guests and patrons of his inn and bathing-house.

IV. That while the plaintiff was then and there his guest, the defendant undertook for compensation paid him by the plaintiff, to keep safely in one of his said bathing-houses, the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, while the plaintiff should bathe.

V. That plaintiff thereupon put into the said bathing-house his clothing, his pocket-book containing money, and such other property as is usually carried upon the person, of the value of dollars, and left the same in the possession and charge of the defendant.

VI. That while the plaintiff was there bathing, his pocket-book and money were, by the negligent and dishonest management of the defendant and his servants, lost and stolen.

VII. That the said inn was upon the seashore; and that facilities for bathing according to the custom of the neighborhood, and as the defendant then well knew, were a part of the accommodations necessary to be afforded by the inn-keepers in that vicinity.

VIII. That the defendant did not provide or maintain a safe for the reception of the money, valuables, or jewelry of his guests.

CONCLUSIONS OF LAW.

I. That defendant is liable for the money so lost in his capacity of inn-keeper.

II. That the defendant is liable for the money so lost, by reason of his negligence and misconduct as bailee for hire of said property.

III. That the defendant is responsible for the negligence and misconduct of his servants in the course of their ordinary employment.

IV. That the money so lost by plaintiff was such a sum as he might reasonably carry on his person.

V. That plaintiff is not entitled to recover his expenses of advertising his loss, or in employing police officers to recover his said pocket-book.

Judgment is ordered for the plaintiff in the sum of dollars, with costs.

M.... N...., Judge

1976. Request for findings.

[*Title.*]

Now comes the plaintiff [*or, defendant*] herein and hereby requests the court to make the following findings of facts and conclusions of law in this action.

[*Here set forth the separate findings desired, in the same manner as in a finding by the court.*]

1977. Exceptions to the findings.

[*Title.*]

Now comes the plaintiff [*or, defendant*] and excepts to the findings of the court heretofore made and filed in this action as follows:

I. He excepts to the first finding of fact therein contained [*or to that part of the first finding of fact therein contained which reads as follows: state the part excepted to*].

II. He excepts to [*state second separate fact excepted to, and so on*].

III. He excepts to said decision because it fails to find [*here state any fact omitted which should have been found*].

IV. He excepts to the refusal of the court to find the following fact as requested [*here set forth any finding requested and refused*].

[*Date.*]

G.... H....,
Attorney for

1978. Notice of filing of the decision.

[*Title.*]

Take notice, that the within [*or, the foregoing*] is a copy of the decision of Mr. Justice M.... N.... in this action, tried before him without a jury, and of his findings of fact and conclusions of law herein, and that the same was filed in the office of the clerk of the court of county, on the day of, 19..

To J.... K....,
..... Attorney.

G.... H....,
..... Attorney.

CHAPTER CXL.

NEW TRIALS AND BILLS OF EXCEPTIONS.

- | | |
|---|---|
| <p>1979. Motion for new trial, on the minutes of the judge.</p> <p>1980. Motion for new trial on ground of newly discovered evidence.</p> <p>1981. Affidavit for new trial, showing newly discovered evidence.</p> <p>1982. Corroborating affidavit.</p> <p>1983. Affidavit to move for a new trial on the ground of surprise.</p> <p>1984. Affidavit for new trial on the ground of surprise.</p> <p>1985. The same, another form.</p> <p>1986. Corroborating affidavit.</p> <p>1987. Affidavit for new trial because of misconduct of a juror.</p> <p>1988. Affidavit for new trial for misconduct of the jury.</p> | <p>1989. Affidavit for new trial on ground of improper communication by a party to the members of the jury.</p> <p>1990. Order granting new trial before judgment on terms.</p> <p>1991. The same, without terms.</p> <p>1992. Same, after judgment entered.</p> <p>1993. Order for new trial for excessive damages.</p> <p>1994. Proposed bill of exceptions, jury trial.</p> <p>1995. Notice served with proposed bill of exceptions.</p> <p>1996. Reporter's certificate (Wisconsin).</p> <p>1997. Proposed amendments to bill of exceptions.</p> <p>1998. Notice of settlement of bill of exceptions.</p> |
|---|---|

1979. Motion for new trial, on the minutes of the judge.¹

[*Title.*]

And now comes the defendant above named at the same term at which the said action was tried and moves, upon the minutes of the judge, to set aside the verdict herein and for a new trial of said action upon the following grounds:

¹ Wis. Stats. 1898 sec. 2878 as amended by Laws 1901 c. 100. In Minnesota the motion should be based on the minutes of the stenographic reporter (Minn. Rev. Laws 1905 sec. 4199); in Iowa it must be made within three days after the verdict or decision is rendered (Iowa Code secs. 3755, 3756), except when made on the ground of newly discovered evidence. In North Dakota the particular errors of law relied on, or the particular in which the evi-

dence is insufficient to sustain the verdict, must be set forth in the motion (N. Dak. Rev. Code secs. 5473, 5474); the same rule exists in South Dakota (S. Dak. Rev. Code C. P. sec. 303 subd. 4. In Nebraska the application must be within three days after verdict, but the grounds of the motion need only be stated in the language of the statute (Cobbey's Ann. Stats. of Nebr. secs. 1299, 1301, 1302).

I. Because the court erred in overruling the defendant's objection to the reception of any evidence under the complaint.

II. Because the court erred in admitting evidence against the objection of the defendant.

III. Because the court erred in refusing to receive evidence offered by the defendant upon the trial.

IV. Because the court erred in instructing the jury in the particulars to which the defendant has filed written exceptions.

V. Because the court erred in refusing to instruct the jury as requested by the defendant in writing.

VI. Because the verdict is contrary to law.

VII. Because the verdict is contrary to the evidence.

VIII. Because the damages are excessive.

[Date.]

J.... K....,

Defendant's Attorney.

1980. Motion for new trial on ground of newly discovered evidence.

[Title.]

Gentlemen: Take notice that upon the affidavits of L.... M.... and N.... O...., copies of which are herewith served upon you, and upon the pleadings and proceedings on file in said action [and upon the bill of exceptions heretofore settled in said action] the undersigned will on the day of, 19.., at o'clock, A. M., of that day at the court house in, move the court for an order setting aside the verdict in this action [and the judgment entered therein] and for a new trial herein upon the newly discovered evidence set forth in said affidavits.

[Date.]

R.... S....,

[Address.]

Attorney for

1981. Affidavit for new trial, showing newly discovered evidence.²

[Title.]

[Venue.]

C.... D...., being duly sworn, says that he is the defendant in the above entitled action.

² Upon an application for a new trial on the ground of newly discovered evidence it must appear that the evidence is material to the issue; not merely impeaching, and not cumulative merely; that it has been discovered since the former trial; that it was not known at the time of such trial;

and that reasonable diligence was used by the party in preparing for the trial. The motion must also be made promptly on the discovery of the new evidence, and if possible the corroborating affidavit of the new witness should accompany the application.

That this action was tried on the day of, 19.., at [..... court], held in and for the county of, at, in said county.

That said trial resulted in a verdict for the plaintiff for dollars.

That since the said trial, and on the day of, 19.., deponent has discovered for the first time that he could have proved by one J.... K...., who resides at, the following facts: that at the time of the representations testified to by L.... M...., upon the trial of this action, he was present; that the representations actually made by the defendant's agent at that interview were [*here set forth declarations made*]; that the said O.... P.... did not say that [*here set forth declaration testified to by L.... M....*] or any thing to that effect.

That before said trial the affiant used due diligence to obtain all the testimony necessary to support the issue on his part; but upon and after diligent inquiry was unable to learn and did not know that said J.... K.... was a material witness or knew anything of said transaction or to obtain the evidence which he is informed and believes he can prove by said witness.

That he was unable to produce any witness to the facts aforesaid on the former trial; that he made diligent search and inquiry for a witness and evidence to prove the said facts, but could find or learn of no one by whom said facts could be proved.

C.... D....

[*Jurat.*]

1982. Corroborating affidavit.

[*Title.*]

[*Venue.*]

J.... K...., being duly sworn, says:

That he is, and was at the time of the conversation between L.... M.... and the defendant's agent, O.... P...., a clerk in the store of the defendant.

That at the said conversation so referred to the said O.... P.... made the representations set forth in the foregoing affidavit, and no others.

That deponent did not communicate the facts aforesaid to the defendant before the verdict in this action because [*here set forth reasons, as for instance, deponent did not know that any action had been commenced or was pending between the parties until after said verdict was rendered*].

J.... K....

[*Jurat.*]

1983. Affidavit to move for a new trial on the ground of surprise.³

[Title.]

[Venue.]

Q.... R...., being duly sworn, says that he is the attorney for the defendant herein.

That this action was brought to recover possession of certain real property, to-wit, a farm in the town of, in this state.

That from the commencement of this action until about [ten] days prior to the trial hereof, the attorney for the plaintiff had in his possession a certain deed, made and executed by the father of the plaintiff, now deceased, conveying said real property in fee to one J.... K....

That plaintiff claims title to said real property by descent from his said father, and in no other way.

That deponent gave plaintiff's attorney reasonable notice to produce said deed on the trial, and further duly and seasonably subpoenaed the plaintiff's attorney to attend the trial, and bring with him the said deed.

That prior to the service of said notice and subpoena, the plaintiff's attorney delivered said deed to the plaintiff, who thereupon deposited the same with L.... M...., the counsel of plaintiff, residing in

That at the trial of this action, deponent learned for the first time that the said plaintiff's attorney had parted with said deed.

That up to the time he was put upon the stand, the plaintiff's attorney entirely concealed from deponent the fact that said deed was out of his possession.

That deponent was taken entirely by surprise by the failure of the plaintiff's attorney to produce said deed.

That on a new trial deponent can, as he believes, obtain the production of said deed, or if not, can prove the contents thereof by the testimony of J.... K....

Q.... R....

[Jurat.]

1984. Affidavit for new trial on the ground of surprise.⁴

[Title.]

[Venue.]

L.... M...., being duly sworn, says that he is the attorney for the defendant in this case and has had sole management

³This motion should be made with promptness. It is a matter much within the discretion of the court and the facts should be established by corroborating affidavits if possible.

⁴Upon the grounds set forth in this affidavit a new trial was granted in *Stoppelfeldt v. Ry. Co.*, 29 Wis. 688.

thereof from its commencement and is the only person familiar with the matters in controversy; that issue was joined in said action on the day of, 19.., and that the same was upon the calendar for trial at the term, 19.., of said court.

That on the day of, 19.., the affiant was unexpectedly called to on professional business of great importance, and expected to be detained there but two days; but that he was compelled by said business to remain there until the day of, 19.., on which day he was informed by O.... P.... that the said court was about to adjourn *sine die*, and that the attorneys for the plaintiff would not consent to a postponement of the trial.

That thereupon, on the day of, 19.., by the first train the affiant hastened home but was unable to reach until the day of, 19.., when he learned that the case had been brought on for trial in his absence, and the damages assessed, and verdict rendered, as now of record.

That upon the affiant's knowledge of the facts in the case and the testimony which the defendant has, and from consultation with the witnesses for the defendant, this affiant is of opinion that upon a retrial, the defendant will be able to establish his defense set forth in his answer.

L.... M....

[*Jurat.*]

[*Attach affidavit of merits, as follows*]:

[*Venue.*]

C.... D.... [defendant], being first duly sworn, says that he is the defendant in the above entitled action; that issue was joined therein on the day of, 19.., and that this defendant has a valid defense in whole in said action [*or in part, specifying which part*].

C.... D....

[*Jurat.*]

1985. The same, another form.*

[*Title.*]

[*Venue.*]

L.... M...., being duly sworn, says that he is the defendant in this action. That the same was brought by plaintiff to recover [*here state plaintiff's alleged cause of action*] and that issue was joined therein, 19.., by the service of defend-

* In the case of State ex rel. v. Hoeflinger, 33 Wis. 594, a new trial was granted on substantially the grounds set forth in this and

the following affidavit and the order was affirmed by the supreme court.

ant's answer, in which the defendant pleaded a general denial to the complaint but did not set forth affirmatively the defense of payment, although as matter of fact said plaintiff's claim had been fully paid and discharged prior to the commencement of this action.

That said action was duly placed upon the calendar at the term of the court but was not then tried but continued to the present term, and that a conversation was then held by counsel in the presence of the Hon. J.... K...., judge of said court, in which the question of the necessity of amending said answer so as to affirmatively show payment was discussed, and that said judge took part in said conversation; that the said conversation was to the effect that such amendment was unnecessary, and that the defendant was thereby misled as to the necessity of amending his answer, setting up said payment as a defense and led to believe that it could be shown in the proofs that such payment had been made; and being so misled, said defendant and his counsel deemed it unnecessary to plead the defense by amendment or to apply for leave to so amend.

L.... M....

[*Jurat.*]

[*Attach affidavit of merits as in Form 1984.*]

1986. Corroborating affidavit.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the defendant in this action; that he has read the affidavit of L.... M.... hereto attached, and was present at the conversation therein referred to, and that the purport of said conversation is truly set forth in said affidavit. That deponent was misled by said conversation into the belief that the answer was sufficient to authorize the proof of payment as a defense, and that deponent relying thereon proceeded to trial of said case without amending said answer and was completely surprised by objection to such proof made at the trial by the plaintiff.

E.... F....

[*Jurat.*]

1987. Affidavit for new trial because of misconduct of a juror.

[*Title.*]

[*Venue.*]

J.... K...., being duly sworn, says that on the day of, 19.., the second day of the trial of this action, on the steps of the court house in the city of, he heard a conver-

sation between one L.... M.... and R.... S...., one of the jurors before whom said action was then on trial.

II. That the said L.... M.... then and there told said juror that he was acquainted with the witnesses in this case, and had been acquainted; that they would swear to any thing for a dollar.

III. That the said L.... M.... applied these remarks to the witnesses for the [defendant] only; that said L.... M.... spoke of U.... V...., one of the defendant's witnesses, in particular, as a bad character.

IV. That the said L.... M.... then and there stated to said juror that W.... X...., the principal witness for the plaintiff, was a very respectable citizen; that he had never heard any thing against him.

V. That the said L.... M.... and the said juror were and are old acquaintances and friends.

VI. That on the next day, and while the trial was still proceeding at the same place, the said L.... M.... in the hearing of deponent, renewed the said conversation, and intimated that in his opinion the defendant was endeavoring to establish his case by false swearing.

J.... K....

[*Jurat.*]

1988. Affidavit for new trial for misconduct of the jury.

[*Title.*]

[*Venue.*]

J.... K...., being first duly sworn, says that he is one of the defendants in the above entitled action.

That the jury, in finding their verdict in this action, as the affiant is informed and believes, agreed that they should each mark the sum of damages he was in favor of assessing and that the sum of such marking divided by the number of jurors should be the amount assessed; and that upon such agreement previously made they so marked, added the result, divided the same by twelve, thereby arriving at the sum assessed as damages.

That four members of the jury, to-wit [*name them*], went, during recess in the trial, and viewed the premises where the alleged defect existed, by which the injury was received.

That the said jury, without leave of the court or the knowledge or consent of defendant's counsel, obtained possession of certain maps of the premises involved in the issue, and certain papers and letters, to-wit [*specify what*], which were not used in evidence, and in their deliberations in the jury room examined and read the same.

J.... K....

[*Jurat.*]

[*There should be added the affidavit of some person with per-*

sonal knowledge of the facts, such as the officer in charge of the jury, if possible.]

1989. Affidavit for new trial on ground of improper communication by a party to the members of the jury.⁶

[Title.]

[Venue.]

J.... K...., being duly sworn, says that on the morning of the second day of the trial of this cause, and after the plaintiff had rested his case, but before the opening of the court, three of the jurors who were empaneled to try the cause, were in the bar-room of a public house in the village of, together with a number of other persons there assembled.

That while said jurors were there, the plaintiff addressed them, and said in their presence and hearing, that the defendants were a cut-throat corporation; that they had swindled the public; that they had defrauded him, the plaintiff; that he, plaintiff, had paid them thousands of dollars; that he delivered the fruit in controversy on said trial to the defendants at their dock to be carried on their boats, and that they refused to carry the same, and went off without it; and in consequence the fruit rotted or spoiled on his, plaintiff's hands, and he lost several hundred dollars; and that defendants ought to stand it or be compelled to suffer the loss.

That thereupon the constable in attendance upon the court remarked to the plaintiff in the presence and hearing of the jurymen, that the persons he was addressing were jurymen, and asked plaintiff if he did not know it.

That plaintiff immediately replied that he knew what he was about, and requested the constable to mind his own business, and that what he had been saying to the jurors about his suit was true; and he, plaintiff, afterwards continued addressing the jurors in substance as before, detailing as he, plaintiff insisted, what were the facts of his case; and the mismanagement of the defendants in relation to his fruit.

J.... K....

[Jurat.]

1990. Order granting new trial before judgment on terms.⁷

[Title.]

The defendant's motion to set aside the verdict herein and for a new trial upon the minutes having been heard on this

⁶ The affidavit of a juror will not be received to show misconduct on the part of himself or other jurors, but may be received

to show misconduct on the part of others by which the verdict may have been influenced.

⁷ When a new trial is granted

day of, 19.., and the court being fully advised in the premises.

ORDERED that, upon payment by the defendant of the taxable costs of the former trial, taxed at dollars, within days from this date, the verdict herein be set aside and a new trial granted upon the ground [*here state grounds*].

Further ordered that upon default in such payment said motion be denied and judgment entered upon the verdict on due proof of such default.

[*Date.*]

By the Court:

O.... P...., Judge.

1991. The same, without terms.^a

[*Introduction as in preceding form.*]

ORDERED that the said verdict be and the same is hereby set aside and a new trial granted, costs to abide the event of the action, on the ground that [*here state grounds, as, that the verdict was perverse, or entirely unsupported by the evidence, or that the court erroneously instructed the jury in this, state erroneous instruction*].

[*Date.*]

By the Court:

O.... P...., Judge.

1992. Same, after judgment entered.

[*Recitals as in preceding orders.*]

ORDERED that the verdict herein and the judgment entered thereon on the day of, 19.., be and they are hereby set aside and vacated on the ground that [*state grounds*], the costs of the former trial to abide the event of the action [*or, upon payment, state terms as in preceding form*].

[*Date.*]

By the Court:

O.... P...., Judge.

1993. Order for new trial for excessive damages.

[*Recitals as in preceding forms.*]

ORDERED: That said verdict be and is hereby set aside and the said motion for a new trial be and is granted [the costs to abide the event], on the ground of excessive damages, unless the plaintiff, within days, file a stipulation consenting to remit

because of errors of the court or because the verdict is perverse, wholly unsupported by the evidence, or procured by fraud, no terms should be imposed; if, however, it be granted because against the preponderance of the evidence

simply, or on the ground of mistake or excusable neglect of the party, or surprise, or for newly discovered evidence, terms should ordinarily be imposed.

^a See note 7.

from said verdict the sum of dollars, and take judgment for the sum of dollars with costs.

In case of such remission, the motion is denied.

By the Court:

O.... P...., Circuit Judge.

1994. Proposed bill of exceptions, jury trial.⁹

[*Title.*]

Be it remembered that this action was brought on for trial at the term of said court, at the court house, in the city of, on the day of, 19.., before the court, Hon. J.... K...., circuit judge, presiding, and a jury, L.... M...., Esq., appearing for plaintiff and O.... P...., Esq., for defendant.

The case being called for trial, before entering upon examination of witnesses, the plaintiff moved for leave to amend his complaint, by inserting therein the following averments [*here insert amendment offered*].

The defendant, by counsel, opposed such motion on the grounds [*state grounds of objections as for instance, that it substantially changed the cause of action*],

Which said motion the court granted and, thereupon, the defendant duly excepted.

The defendant then moved for a continuance on the ground that he had been taken by surprise by the said amendment, and filed the following affidavit in support of such motion [*insert affidavit*] which motion the court denied, and the defendant duly excepted.

The plaintiff then, to maintain the issue on his part, called as a witness E.... F...., who was duly sworn.

Thereupon the defendant objected to the reception of any evidence under the complaint for the reason that the complaint does not state facts sufficient to constitute a cause of action, which objection was overruled by the court and the defendant duly excepted.

⁹ The purpose of the bill of exceptions is to incorporate in the record a narrative of the trial with the rulings and exceptions occurring therein and which would not otherwise be a part of the record of the case. This form is prepared specially with reference to the statutes and court rules of Wisconsin (Wis. Stats. 1898 sec. 2873; Cir. Ct. Rule XXIII), but may in substance be

utilized in other states covered by this work. Minn. Rev. Laws 1905. secs. 4202, - 4203; N. Dak. Rev. Codes sec. 5467; S. Dak. Rev. Code C. P. sec. 296; Cobbe's Ann. Stats. of Nebr. sec. 1295. In Iowa the bill of exceptions is abolished in equity cases and practically superseded in all other cases where the testimony is taken in shorthand by direction of the court. Iowa Code sec. 3749.

The witness then testified as follows [*here insert testimony in condensed narrative form until a question which was objected to is reached, when it should be inserted in full with ruling and exception as follows*]:

Q. [*Insert question.*]

To which question the defendant objected as immaterial [*state all grounds of objection fully as made*], which objection was overruled and the defendant excepted.

A. [*Insert answer in full.*]

Defendant then moved to strike out said answer for the reason that [*state reason*], which motion was overruled and defendant excepted. [*Proceed in like manner with the direct examination of the witness.*]

Upon cross-examination the witness testified [*proceed as with the direct examination, also with the redirect examination if any and with the plaintiff's other witnesses*].

The plaintiff then rested.

The defendant thereupon moved for judgment of nonsuit on the ground that the evidence failed to prove the plaintiff's cause of action, which motion was overruled by the court and the defendant duly excepted [*or, which motion was granted and the plaintiff duly excepted*].

The defendant, to maintain the issue on his part, called as a witness G.... F...., and offered to prove by said witness [*here state what*], to which plaintiff, by counsel, objected. The court sustained the objection and the defendant duly excepted.

The said witness then testified as follows [*here state testimony and rulings as in case of plaintiff's witnesses*].

The said witness upon cross-examination testified as follows [*here state same*].

The defendant then rested.

The plaintiff, to further maintain the issue on his part, then called J.... K...., who being sworn, testified [*here insert testimony with objections and exceptions*].

The testimony then closed. The foregoing is all the evidence given on both sides.¹⁰

[*Or, when the testimony is only in part given, the bill should state: The foregoing is all the testimony given on both sides, necessary to present the questions of law raised upon the trial.*]

¹⁰ The bill must be certified to contain all the evidence in case it be desired by the appellant to reverse the judgment on the ground that the verdict or finding is not

sustained by the evidence. This statement may also properly be inserted in the certificate of the judge at the close of the bill.

The defendant then, before argument to the jury, requested that the jury be directed to find a special verdict, and submitted the following proposed questions for such verdict [*insert proposed questions*]. Thereupon the court directed that the following questions be submitted to the jury for a special verdict [*insert questions*]. The defendant objected to the submission of the first question of said special verdict for the reason [*state reason*], which objection was overruled by the court and the defendant excepted.

The plaintiff [*or defendant*] then asked the court to instruct the jury as follows [*here insert instructions asked, separately, and state at the end of each instruction refused*], which instruction the court refused and the plaintiff [*or defendant*] duly excepted.

The court then instructed the jury as follows [*here insert charge in separate propositions inserting at the foot of each proposition to which exception was taken*], to which instruction the defendant duly excepted.

The jury then retired, and after deliberation returned into court with their verdict, which is of record, wherein they found for the plaintiff and assessed his damages at the sum of dollars [*or, if the verdict is special, set it forth in detail*].

And afterwards, at the said term, defendant moved for a new trial, on the judge's minutes, on the ground:

1. That the verdict is contrary to law.
2. That the verdict is contrary to the evidence.
3. [*Set forth other grounds, if any.*]

Which motion the court overruled, and thereupon the defendant duly excepted.

And because the foregoing evidence, rulings, instructions and exceptions do not appear of record, I, the undersigned, the judge, who tried said action, have, on due notice, settled and signed this bill of exceptions to the end that the same be made part of the record herein, this day of, 19.. [and I certify that so much of said testimony as appears herein in the form of question and answer so appears by my direction in that form because I deemed it material that it should so appear].¹¹

O.... P...., ... Judge,
.... Judicial Circuit.

[*The bill should be folioed. Circuit court rules Wis. X. Each line should be numbered, so that proposed amendments may specifically refer to the line to be amended.*]

¹¹ See circuit court rules Wis. XXIII.

1995. Notice served with proposed bill of exceptions.

[Title.]

SIR: Please take notice that the within [*or, annexed*] is a copy of the bill of exceptions, proposed on behalf of the defendant in this action, and that a copy of the reporter's notes taken at the trial and transcribed in longhand are also delivered to you herewith.¹²

[Date.]

To G.... H...., Esq.,
Plaintiff's Attorney.

J.... K....,
Defendant's Attorney.

1996. Reporter's certificate (Wis. circuit court rule XXIII).

[Title.]

I, L.... M...., phonographic reporter of the circuit court, state of Wisconsin, duly appointed and qualified, do hereby certify that the foregoing is a correct transcript, in long hand, of my notes taken upon the trial of said action and that the same contains a full and complete transcript of the evidence and all other matters relating to said action contained in said notes.

[Date.]

L.... M....,
Official Reporter.

1997. Proposed amendments to bill of exceptions.

[Title.]

SIR: Please take notice that the following amendments are proposed on the part of the plaintiff to the bill of exceptions, proposed by the defendant, to-wit:

First. On page, line, strike out the words [*state words*].

Second. On page, line, and at the end of sentence insert the following [*state what*].

Third. On page, line, strike out the words [*state what*], and insert in place thereof the words [*state them*].

[Date.]

To J.... K...., Esq.,
Defendant's Attorney.

G.... H....,
Plaintiff's Attorney.

¹² In Wisconsin a certified transcript, in longhand, of the phonographic reporter's notes

must be delivered to the opposing party with the proposed bill of exceptions. C. C. Rule XXIII.

1998. Notice of settlement of bill of exceptions.*[Title.]*

SIR: Please take notice that the defendant's proposed bill of exceptions in this action with the amendments thereto proposed by the plaintiff, will be presented for settlement to the Hon. O.... P...., the judge who tried this action, at his chambers, in the of, in county, on the day of, 19.., at o'clock .. M.

J.... K....

To G.... H...., Esq.
Attorney for Plaintiff.

Attorney for Defendant.

CHAPTER CXLI.

CONTEMPT PROCEEDINGS.

1999. Order of summary conviction of a witness for criminal contempt in refusing to answer a question in the immediate presence of the court (Wisconsin and North Dakota).
2000. The same, for a breach of the peace or disturbance in open court.
2001. Commitment for criminal contempt committed in immediate view of the court (Wisconsin and North Dakota).
2002. Affidavit for order to show cause why party should not be punished criminally for contempt not committed in presence of the court (Wisconsin).
2003. The same, to punish criminally the publication of a false report of judicial proceedings (Wisconsin and North Dakota).
2004. Order to show cause in criminal contempt, based on either of last two affidavits.
2005. Attachment for arrest of contemnor in criminal proceedings for contempt.
2006. Order of conviction for criminal contempt not committed in presence of the court (Wisconsin and North Dakota).
2007. Commitment for criminal contempt not committed in presence of the court (Wisconsin and North Dakota).
2008. Order of summary conviction, in civil contempt proceedings, of a witness for refusing to answer proper questions, in the presence of the court (Wisconsin).
2009. Affidavit in civil contempt proceedings, showing failure to comply with court's order for payment of money (Wisconsin).
2010. Warrant of commitment in civil contempt proceedings for failure to pay money (Wisconsin).
2011. Affidavit on which to move for order to show cause, or attachment, in civil contempt proceedings; general form (Wisconsin and Minnesota).
2012. The same, for violation of injunctive order.
2013. The same, for attachment of witness for not obeying a subpoena.
2014. Warrant of arrest of contemnor (Minnesota).
2015. Attachment for witness disobeying a subpoena (Wisconsin).
2016. Writ of *habeas corpus* to

- | | |
|--|---|
| bring up contemnor already in custody by virtue of other process (Wisconsin and Minnesota).
2017. Order that interrogatories be filed, after attachment (Wisconsin and North Dakota).
2018. Interrogatories to be filed under last preceding order (Wisconsin and North Dakota).
2019. Answers to interrogatories in contempt proceedings | (Wisconsin and North Dakota).
2020. Judgment of conviction in civil contempt proceedings and directing payment of fine (Wisconsin).
2021. The same, where indemnity for actual loss is ordered to be paid instead of a fine (Wisconsin and North Dakota).
2022. The same, where imprisonment is ordered.
2023. Commitment for civil contempt. |
|--|---|

The power to punish as contempt any act which tends to obstruct the course of justice or prejudice the trial of an action or proceeding in court is held to be inherent in courts of general jurisdiction. This power may be regulated and the manner of its exercise prescribed by statute, but it can not be wholly taken away nor substantially impaired. *State ex rel. v. Circuit Court*, 97 Wis. 1; *Kregel v. Bartling*, 23 Nebr. 852 s.c. 37 N. W. 668. In Wisconsin an act of contempt may be punished either criminally or civilly.

Acts of contempt which may be punished criminally are enumerated in Wis. Stats. 1898 sec. 2565; when committed in the immediate view and presence of the court they may be punished summarily without process, but in other cases the accused party must have notice of the accusation and time to make his defense. *Id.* sec. 2566. The punishment may be by fine or imprisonment or both. *Id.* secs. 2567, 2568. This proceeding is brought to vindicate the dignity of the court and is to be prosecuted in the name of the state, and the fine goes to the school fund as in criminal prosecutions.

Acts which may be punished civilly are enumerated in Wis. Stats. 1898 sec. 3477. The purpose of civil contempt proceedings is, primarily, to indemnify the party whose rights or remedies have been defeated or prejudiced by the act of contempt, or to compel the performance of a duty which may yet be performed, or both. A fine or imprisonment, or both, may be imposed, or if actual loss or injury be shown the guilty party may be ordered to pay a sufficient sum as indemnity to the injured party instead of a fine. *Emerson v. Huss*, 127 Wis. 215 s.c. 106 N. W. 518. The proceedings may be summary when the contempt is committed in the presence of the court; otherwise they

are to be based upon affidavit and order to show cause or attachment. The papers should be entitled in the action in which the contempt occurred if an order to show cause be applied for, but if an attachment be issued the proceeding becomes an original special proceeding in the name of the state on the relation of the complainant. Wis. Stats. 1898 sec. 3481.

In Minnesota no distinction is preserved by the statutes between civil and criminal contempt proceedings; but contempts are divided into direct contempts, which are those committed in the immediate view and presence of the court, and may be punished summarily without process or proof; and constructive contempts, which are those not committed within the immediate presence of the court. Minn. Rev. Laws 1905 chap. 91; State ex rel. v. Ives, 60 Minn. 478 s.c. 62 N. W. 831. A prosecution for constructive contempt is begun by affidavit to be followed by warrant of arrest or order to show cause. Punishment is by imprisonment or fine or both, and by imposition of an indemnity to be paid for any actual loss to the injured party. Minn. Rev. Laws 1905 secs. 4648, 4649.

In Iowa contempt proceedings are criminal in their nature and governed by chapter 17 title 21 Iowa Code. If the contempt be committed in the presence of the court it may be punished summarily, but if not the proceedings must be based on affidavit and rule to show cause; the punishment may be by fine or imprisonment or both. Iowa Code secs. 4464, 4465.

In North Dakota contempts are classified into civil and criminal contempts, substantially similar to the division made in Wisconsin, and the procedure closely follows the Wisconsin procedure. N. Dak. Rev. Codes chap. 34 secs. 5932-5954.

The South Dakota code seems to contain no general provisions governing the procedure or punishment in contempt proceedings in courts of record. There are, however, numerous sections providing for punishment as for contempt upon the failure of persons to obey summons, subpoena or other orders of the court, and in some instances the procedure and punishment is specified. S. Dak. Rev. Code C. P. secs. 494, 495.

In Nebraska contempts are regulated by Cobby's Ann. Stats. of Nebr. secs. 1699-1701. The proceedings are held to be in their nature criminal, direct when committed in presence of the court and constructive when not so committed. Proceedings for constructive contempts must be commenced by information under oath or affidavit stating positively all the necessary facts, as in a prosecution for crime.

1999. Order of summary conviction of a witness for criminal contempt in refusing to answer a question in the immediate presence of the court (Wis. Stats. 1898 secs. 2565, 2566; N. Dak. Rev. Codes secs. 5932, 5933).¹

STATE OF

In Court County.

State of,

Plaintiff,

vs.

A.... B....,

Defendant.

At a general term of said court begun and held in the court house in the city of on the day of, 19.., and on the day of, 19..

President, Hon. J.... K...., Circuit [*or* District] Judge, Presiding.

On this day of, 19.., at the hour of o'clock, the said court being in session and the action of L.... M.... vs. O.... P.... being then on trial, the above named A.... B.... * was duly called as a witness for the plaintiff in said action and duly sworn, and was as such witness asked the following question [*insert question*], and the court having ruled that said question was competent and proper and having ordered the said A.... B.... to answer the same, he, the said A.... B...., then in the immediate view and presence of the court, contumaciously refused, and still refuses, to answer the said question, the same being a proper and legal interrogatory; and the said A.... B.... being now still present in court; it is now

ORDERED AND ADJUDGED that he the said A.... B.... is guilty of a criminal contempt of court in so contumaciously refusing to answer said question; and it is further adjudged that the said A.... B...., as punishment for said contempt, be imprisoned in the jail of the county of for the term of days [and pay a fine in the sum of dollars, and that he be committed to the jail of county until said fine is paid or until he be discharged therefrom according to law].

By the Court:

J.... K...., Judge.

¹ This form and the two following forms, though specially drawn to meet the requirements of the codes of Wisconsin and North Dakota, will doubtless

serve, with slight changes, in other states for the punishment of contempts committed in the immediate view of the court.

2000. The same, for a breach of the peace or disturbance in open court.

*[Proceed as in last preceding form to the * and then continue]* did then and there in open court and in the immediate view and presence of the court commit an assault and battery upon the person of one C.... D.... *[or did then and there make a disturbance in court by loudly and repeatedly shouting in profane and opprobrious language, or otherwise describe the disturbance, breach of the peace or disorderly proceeding, according to the fact]*, and did thereby wilfully interrupt the business of the court and impair the respect due to its authority, and the said A.... B.... being now still present in court, it is now

ORDERED AND ADJUDGED, etc. *[continue as in last preceding form]*.

2001. Commitment for criminal contempt committed in immediate view of the court (Wis. Stats. 1898 secs. 2567, 2568; N. Dak. Rev. Codes sec. 5933).

The State of to the Sheriff of County,

GREETING: Whereas, on the day of, 19.., in an action then pending and on trial in the court for county, at the court house, in the city of, in county, wherein L.... M.... is plaintiff and O.... P.... is defendant, A.... B.... was called and sworn as a witness *[here recite facts as in the last preceding order, and also the adjudication of the court and continue]*,

And whereas the said A.... B.... has not paid the said fine so imposed upon him and still refuses to pay the same,

Now therefore we command you that you take the body of the said A.... B.... and safely keep him in custody in the common jail of the county of until the said A.... B.... shall pay the said fine and costs or shall be thence discharged according to law, not exceeding, however, the term of thirty days from this date *[or, if the punishment be by imprisonment, substitute after the command to imprison, for the term of days from this date or until he be thence discharged according to law]*.

Witness, the Hon. J.... K...., judge of our court
for the county of, at
the court house in the of
....., in said county, this
.... day of, 19..

C.... K...., Clerk.

[SEAL OF COURT.]

2002. Affidavit for order to show cause why party should not be punished criminally for contempt not committed in presence of the court (Wis. Stats. 1898 sec. 2565).

STATE OF
 Court for County.

State of,	} Plaintiff,
vs.	
A.... B....,	
	Defendant.

[*Venue.*]

Y.... Z.... being first duly sworn says: *

That on the day of, 19.., in an action pending in said court, wherein L.... M.... was plaintiff and O.... P.... defendant, an order was duly made by this court, of which a copy is hereto annexed marked Exhibit A, requiring the above named defendant to [*here specify act required*].

That on the day of, 19.., the said order was duly served on said defendant, at said county, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the said original order aforesaid with the signature of the judge of said court appended thereto as more fully appears by the affidavit of service indorsed on said order and on file in this court [*or attached hereto and marked Exhibit B*].

That said A.... B.... has wilfully and contumaciously refused and still refuses to obey said order in this, to-wit [*state the act or failure to obey*].

That this application is made for the purpose of obtaining an order to show cause why said A.... B.... should not be punished as for criminal contempt.

Y.... Z....

[*Jurat.*]

2003. The same, to punish criminally the publication of a false report of judicial proceedings (Wis. Stats. 1898 sec. 2565; N. Dak. Rev. Codes sec. 5932).

[*Commence as in last preceding form to the * and continue*]:

That on the day of, 19.., a certain action wherein L.... M.... was plaintiff and O.... P.... was defendant, was pending in the said court and was brought on for trial and tried before said court at the court house in the city of in said county.

That the defendant A.... B.... then was and still is the publisher and proprietor of a certain daily newspaper of large circulation called the N.... Z...., which was and still is pub-

lished at the said city of, and that the said A. . . . B. . . . on the day of, 19. . . , caused to be printed and published in his said newspaper a pretended report of the proceedings of said court upon said trial, in the following words [*insert copy of report*].

That the said pretended report was and is a grossly false and inaccurate report of the proceedings upon said trial, in this [*here state particulars in which the report is false or inaccurate, negating the truth of the report as to each particular in which it was erroneous*].

That the falsity and inaccuracy of said report in the particulars aforesaid was well known to the defendant at the time of said publication, and that the said defendant wilfully published the same.

That this application is made, etc. [*conclude as in last preceding form*].

2004. Order to show cause in criminal contempt, based on either of last two affidavits.

[*Title and caption as in first form in this chapter.*]

On reading and filing the affidavit of Y. . . . Z. . . . ,

ORDERED that the above named defendant A. . . . B. . . . show cause before this court at the court house in the city of in said county on the day of, 19. . . , at . . . o'clock in the noon of said day, or as soon thereafter as counsel can be heard, why he should not be punished as for contempt for his misconduct in failing to obey the order of said court as set forth in the said affidavit [*or otherwise state the act of contempt according to the fact*].

Let this order and a true copy of said affidavit be served on said A. . . . B. . . . at least days before the time herein fixed for hearing.

By the Court:

J. . . . K. . . . , Judge.

2005. Attachment for arrest of contemner in criminal proceedings for contempt.

STATE OF
 Court County.

The State of ,	}
Plaintiff,	
vs.	
A. . . . B. . . . ,	
Defendant.	

The State of to the Sheriff of County.

GREETING: We hereby command you that you attach A. . . . B. . . . and have his body before our said court,

at a term thereof to be held at the court house in the city of , in said county, on the day of , 19.. , at o'clock A. M. of said day, then and there to make answer concerning a certain contempt which it is alleged he has committed against said court in wilfully refusing to obey that certain order of said court [*describe order*] requiring him to [*state act required and disobeyed*] which order was duly served upon him, also to answer as to such other matters as may be then and there laid to his charge, and to abide and perform the order of the court made thereon.

Witness, etc. [*conclude as in Form 2001*].

2006. Order of conviction for criminal contempt not committed in presence of the court (Wis. Stats. 1898 sec. 2567; N. Dak. Rev. Codes sec. 5932).

[*Title and caption as in first form in this chapter.*]

The order dated , 19.. , requiring the defendant A.... B.... to show cause before this court why he should not be punished as for a criminal contempt for his misconduct in [*here specify act of contempt*], coming on to be heard before the court, at the time fixed therein, and said defendant having appeared in person, and by W.... X.... , his counsel [*or in case of arrest of defendant by an attachment*]: The attachment issued by this court in the above entitled matter on the day of , 19.. , requiring the arrest of the defendant A.... B.... to answer for his misconduct in [*specify act of contempt*], having been duly returned, and the said defendant having been arrested thereunder and brought before the court, and the said matter having been heard and tried before the court, the said A.... B.... being present in person and by his counsel W.... X.... , and the court having heard the proofs and arguments of the parties, and given full opportunity to the said defendant to make defense and purge himself of said contempt,

IT IS ORDERED and adjudged, etc. [*continue as in Form 1999*].

2007. Commitment for criminal contempt not committed in presence of the court (Wis. Stats. 1898 sec. 2567; N. Dak. Rev. Codes sec. 5932).

The State of to the Sheriff of County.

GREETING: Whereas in certain proceedings for criminal contempt brought and tried in the court of county aforesaid, against A.... B.... , it was made to appear to the court that the said A.... B.... had been guilty of a criminal contempt of said court, in this, that [*here state the particular circumstances of the contempt*];

And whereas it was thereupon duly adjudged by this court that the said A.... B.... was guilty of a criminal contempt and that he be punished therefor by *[state terms of judgment]*;

And whereas the said A.... B.... has not paid the said fine so imposed on him and still refuses to pay the same;

Now therefore we command you that, etc. *[conclude as in Form 2001]*.

2008. Order of summary conviction, in civil contempt proceedings, of witness for refusing to answer proper questions, in the presence of the court (Wis. Stats. secs. 3477, 3478).

[Title and caption as in the first form in this chapter save that it should be entitled in the civil action in which the contempt occurred instead of being entitled as a separate criminal action.]

[Recite the contempt committed substantially as in the first form in this chapter and proceed]:

IT IS ADJUDGED and determined that he, the said C.... D...., is guilty of contempt of court in so contumaciously refusing to answer said question; that the said misconduct was calculated to and actually did defeat, impair, impede and prejudice the rights and remedies of the plaintiff in said action [and that the said plaintiff suffered actual loss and injury thereby in the sum of dollars].

And it is further adjudged that the said C.... D...., as punishment for said contempt [pay a fine in the sum of dollars and costs, *or in case of actual loss*, pay to the said A.... B.... the sum of dollars to indemnify the said A.... B.... for his actual loss aforesaid and to satisfy his costs and expenses, and that the said C.... D.... be committed to the common jail of county until such fine and costs *or indemnity* be paid or he be discharged therefrom according to law].

[If the punishment be by fine and imprisonment], be imprisoned in the common jail of county for the term of days from this date or until he be discharged therefrom according to law; and pay a fine, etc. *[as above]*.

By the Court:

J.... K...., Judge.

[The commitment under the foregoing conviction may be substantially as in Form 2001, with appropriate variations necessitated by the difference in the form of the judgment.]

2009. Affidavit in civil contempt proceedings, showing failure to comply with court's order for payment of money (Wis. Stats. 1898 sec. 3479).²

STATE OF WISCONSIN.

..... Court County.

A.... B....,	} Plaintiff,
vs.	
C.... D....,	
	Defendant.

[*Venue.*]

A.... B...., being first duly sworn, says that he is the plaintiff in the above entitled action; that on the day of, 19.., at, in said county, he served the order hereto annexed [*or a copy of which is hereto annexed*] on C.... D...., the defendant in this action, by delivering to him personally a true copy thereof, and at the same time exhibiting to him the original order and the signature of J.... K...., the judge who signed the said order thereon; and then and there made personal demand of the said C.... D...., that he pay the sum required to be paid by said order: and that the said C.... D.... then and there refused to pay the same and stated to affiant that he would not pay said sum at any time; and affiant further says that said sum is still unpaid.

[*Jurat.*]

A.... B....

2010. Warrant of commitment in civil contempt proceedings for failure to pay money (Wis. Stats. 1898 sec. 3479).

STATE OF WISCONSIN.

..... Court County.

A.... B....,	} Plaintiff,
vs.	
C.... D....,	
	Defendant.

The State of Wisconsin to the Sheriff of County.

GREETING: Whereas on the day of, 19.., an

² This form and the form immediately following are intended to meet the provisions of sec. 3479 Wis. Stats. 1898, which provide that upon proof, by affidavit, of service of an order requiring the payment of money and of refusal to pay the court or judge may at

once issue a warrant of commitment to jail until the sum and costs are paid. No order to show cause is required under this section, nor is any formal judgment necessary save the formal warrant of commitment as in the form immediately following.

order was duly made and entered by this court in the above entitled action ordering and requiring the defendant C.... D.... to pay [*state terms*]; and whereas it has been made to appear by the affidavit of A.... B.... that on the day of, 19.., at the said A.... B.... made personal demand upon said C.... D.... for the payment of said sum of dollars required to be paid by said order and that the said C.... D.... then and there contumaciously refused and still refuses to pay the same;

And whereas it appears that the said refusal of the said C.... D.... to comply with the order of the court aforesaid was calculated to and actually did defeat and impair the rights and remedies of the said A.... B.... in said action,

Now, therefore, we hereby command you that you take the body of the said C.... D...., and commit him to the common jail of said county of, there to remain until such sum and the costs and expenses of the proceedings, to-wit, the sum of dollars shall be paid, or until he be thence discharged according to law.

Witness, the Hon. J.... K...., judge of said court, at the court house, in the city of, in said county, on the day of, 19.. J.... K...., Clerk.

[SEAL OF COURT.]

2011. Affidavit on which to move for order to show cause, or attachment, in civil contempt proceedings; general form (Wis. Stats. 1898 sec. 3480; Minn. Rev. Laws 1905 sec. 4642).

STATE OF
..... Court, ... County.

A.... B....,

Plaintiff,

vs.

C.... D....,

Defendant.

[*Venue.*]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action *.

That [*here state particularly all the facts necessary to be proven to show that a civil contempt under the proper statute has been committed with substantially that certainty required in a criminal complaint*].

That the said misconduct of the said C.... D.... was calculated to and did in fact defeat and impair the rights and remedies of the plaintiff A.... B.... in the above entitled action [and that said misconduct caused an actual loss and injury to this affiant in the sum of dollars].

That no previous application has been made for the punishment of said misconduct and that affiant makes this affidavit for the purpose of moving for an order to show cause why said C.... D.... should not be punished as for contempt.

A.... B....

[*Jurat.*]

[*In case the application is for an attachment the affidavit should be entitled, "State of, Ex Rel, A.... B...., Plaintiff, v. C.... D...., Defendant." Wis. Stats. 1898 sec. 3481; N. Dak. Rev. Codes sec. 5937.*]

[*The order to show cause in Wisconsin and North Dakota may be substantially as in Form 2004, entitling it, however, in the civil action in which the contempt occurred; if an attachment be issued it may be as in Form 2005, entitling it "State Ex Rel, A.... B.... v. C.... D...."*]

2012. The same, for violation of injunctonal order.

[*Title and caption as in last preceding form.*]

[*Proceed as in last form to the *, and continuing*]:

That said action was commenced by this affiant against the said defendant and is now pending in this court for the purpose of obtaining a divorce from said defendant and that on the day of, 19.., an injunctonal order was issued out of this court in said action enjoining and prohibiting the said defendant C.... D.... from imposing any restraint upon affiant's personal liberty during the pendency of said action, which order was duly and personally served upon said defendant on the day of, 19.., and at the same time the original order with the signature of J.... K...., who granted said order, appended thereto, was exhibited to said C.... D....

That notwithstanding said order the said C.... D.... on the day of, 19.., at, with force and arms made an assault upon this affiant and beat and bruised her and deprived her of her personal liberty for the space of days, to-wit, from to, in contempt of said injunction order.

That the said misconduct of the said C.... D.... was calculated to and did, etc. [*proceed as in last preceding form*].

2013. The same, for attachment of witness for not obeying a subpoena.

STATE OF

.....Court, ... County.

State of ex rel. A.... B....,
Plaintiff.

vs.

L.... M....,

Defendant.

[Venue.]

A.... B.... being duly sworn says he is the plaintiff in the action of A.... B.... vs. C.... D.... which action is now pending in said court.

That L.... M.... is a necessary and material witness for the plaintiff in said action without whose testimony he can not safely proceed to the trial of the issue in said action, as affiant is advised by O.... P...., Esq., his counsel, who resides at, after affiant has fully stated to his said counsel what he expects to prove by the said L.... M...., and as this affiant verily believes.

That a subpoena, which is hereto annexed, was duly served on said L.... M...., on the day of, 19.., at said county, as appears by the proof of service indorsed thereon; and that the fees of said witness for said trial and attendance, to-wit, the sum of dollars, were duly paid [*or, tendered*] to him, as appears by said proofs indorsed on said subpoena.

That the distance to be traveled by said witness in coming from his residence, where said subpoena was served on him, to the place of trial of this action, is miles.

That said witness has failed and neglected to appear as required by said subpoena, and has disobeyed the command thereof.

That affiant makes this affidavit for the purpose of moving for an attachment for said witness, and that no previous application has been made for such attachment.

[Jurat.]

A.... B....

2014. Warrant of arrest of contemner (Minn. Rev. Laws 1905 secs. 4642-4644).

[Venue.]

The State of to the Sheriff of County,

GREETING: You are hereby commanded to apprehend L.... M.... of and bring him before the court of county at the court house in the city of forthwith [*or state time and place*], then and there to answer for an al-

leged contempt committed by him in not [*here insert alleged act of contempt*].

[*If the warrant fix a time in the future for the appearance and the court deem it best to admit the party to bail, continue as follows*]:

And you are further directed and authorized to admit the said L.... M.... to bail for his appearance at the time and place above specified by taking from said L.... M.... a recognizance in the sum of dollars, with two sufficient sureties, to the effect that he will appear on the return of this warrant and abide the order of the court thereon, or pay as may be directed the sum therein specified.

Hereof fail not; and make due return of this warrant and your doings therein at the time and place aforesaid.

Witness, etc. [*as in Form 2001*.]

2015. Attachment for witness disobeying a subpoena (Wis. Stats. 1898 secs. 3480-4065).

The State of to the Sheriff of County,

GREETING: Whereas, it has been made to appear to our court for county, by due proof, that on the day of, 19.., at said county, a subpoena issued out of said court directed to said L.... M.... requiring him to appear before our said court, on the day of, 19.., at o'clock in the forenoon of said day, to give evidence in a certain cause then and there to be tried between A.... B...., plaintiff, and C.... D...., defendant, on the part of the plaintiff, was duly and personally served upon said L.... M.... at on the day of, 19.., and that the fees of said witness for such attendance, and for traveling to and returning from the place where he is required by said subpoena to attend, were then and there duly paid [*or, tendered*], and that he has failed and neglected to attend, as required by such subpoena, and is not in attendance.

Now, therefore, we command you that you attach the said L.... M...., and forthwith bring him before our said court, at the court house, in the city of, in said county, to answer for his contempt in not obeying said subpoena, and to testify in said cause in which he is summoned as aforesaid.

Witness, etc. [*as in Form 2001*].

2016. Writ of habeas corpus to bring up contemner already in custody by virtue of other process (Wis. Stats. 1898 sec. 3485; Minn. Rev. Laws 1905 sec. 4643).

[*Venue*.]

The State of to the Sheriff [*or, Keeper of the Common Jail of County*,

GREETING: We command you, that you have the body of L.... M...., detained in our said jail under your custody, as it is said, under safe and secure conduct, before our court for county at the city of in said county on the day of, 19.., at of the clock, on the noon. then and there to answer for an alleged contempt committed by him in not [*here insert alleged act of contempt*].

And you are further commanded to detain the said L.... M.... before our said court at the time and place aforesaid until the further order of the court.

Hereof fail not; and make due return of this writ with your doings thereon at the time and place aforesaid.

Witness, etc. [*as in Form 2001*].

2017. Order that interrogatories be filed, after attachment
(Wis. Stats. sec. 3488; N. Dak. Rev. Codes sec. 5942).

STATE OF
.....Court for County.

The State of ex rel. A.... B....,	} Plaintiff,
vs.	
L.... M....,	
	Defendant.

An attachment having been issued out of this court against L.... M.... upon the complaint of A.... B...., charging him, the said L.... M...., with misconduct in violating the order of this court, made and entered in an action, wherein A.... B.... is plaintiff, and C.... D.... defendant, dated, 19.., directed to and requiring said L.... M.... to [*state act required; or otherwise state the act of contempt according to the fact*].

And the said L.... M.... being in custody and now here present to answer the attachment herein, and appearing by W.... X...., his attorney, and the relator by Y.... Z...., his attorney, and not admitting but denying the offense charged; after hearing counsel for the respective parties,

ORDERED that the said A.... B.... file with the clerk of this court and serve on said L.... M....'s attorneys within days, interrogatories specifying the facts and circumstances alleged against said L.... M.... and requiring his answer on oath thereto, and that within days after such service of said interrogatories, the said L.... M.... file and serve on the relator's attorney his written answers thereto on oath.

Further ordered that said L.... M.... be held in custody by the sheriff [*or, attend without further notice before this court*], to abide the judgment and determination thereof as to his alleged contempt.

[*Date.*]

By the Court:

J.... K...., Circuit Judge.

2018. Interrogatories to be filed under last preceding order
(Wis. Stats. 1898 sec. 3488; N. Dak. Rev. Codes sec. 5942).

[*Title as in last preceding form.*]

And now comes the said relator pursuant to the order of this court and files the following interrogatories to be propounded to L.... M...., touching a contempt alleged against him in the above entitled matter for [*here state contempt charged*]:

I. Are you the defendant in an action pending in said court entitled A.... B.... vs. L.... M.... ?

II. Was an order of said court served on you, on the day of, 19.., requiring you to [*here state requirement of the order*] ?

III. If you answer yes to the foregoing second interrogatory, did you obey said order?

IV. If you answer no to the third interrogatory, state why you failed to obey said order.

[*Follow with other questions as the case may require.*]

W.... X....,

Attorney for Relator.

2019. Answers to interrogatories in contempt proceedings
(Wis. Stats. 1898 sec. 3488; N. Dak. Rev. Codes sec. 5942).

[*Title as in Form 2017.*]

Answers of the said L.... M.... to the interrogatories filed by the relator herein on the day of, 19..

I. To the first interrogatory he answers, Yes.

II. [*Proceed in like manner to answer each interrogatory.*]

L.... M....

[*Venue.*]

L.... M.... being duly sworn says he is the person charged with contempt in the above entitled matter and that the above and foregoing answers to the interrogatories filed by the relator herein are true.

L.... M....

[*Jurat.*]

2020. Judgment of conviction in civil contempt proceedings and directing payment of fine (Wis. Stats. 1898 sec. 3489).

[Title of court and cause and caption as in first form in this chapter. If the defendant comes before the court on order to show cause the title used should be the title of the action or proceeding in which the contempt was committed, if on attachment or habeas corpus this order should be entitled "State of ex rel. [complainant] vs. L.... M.... [contemner].

The order of this court dated, 19.., requiring L.... M.... to show cause why he should not be punished as for contempt for his misconduct in [*here specify act of contempt*], coming on to be heard before the court, at the time fixed therein, and said L.... M.... having appeared in person, and by W.... X...., his counsel, and the plaintiff also appearing by his attorney(s) herein, and having heard the proofs and arguments of the parties, and given full opportunity to the said defendant to make defense and purge himself of said contempt.

ORDERED and adjudged that L.... M.... is guilty of contempt in having wilfully disobeyed the order made by the court in this action, on the day of, 19.., in this, that he [*state the violation specifically*].

That the said misconduct of said L.... M.... was calculated to and actually did defeat, impair and prejudice the rights and remedies of the said A.... B...., plaintiff herein. *

That, as punishment for said misconduct, the said L.... M.... do forthwith pay a fine of dollars and the costs and expenses of these proceedings, amounting in all to dollars, and that he be committed to the county jail of county until said fine and costs and expenses be paid and [*if the misconduct consist of the omission of an act still within his power*], until he shall comply with said order by [*here state the act to be done*].

By the Court:

J.... K...., Judge.

2021. The same, where indemnity for actual loss is ordered to be paid instead of a fine (Wis. Stats. 1898 sec. 3490; N. Dak. Rev. Codes sec. 5944).

*[Proceed as in last preceding form to the * and continue]:*

That as punishment for said misconduct the said L.... M.... forthwith pay to A.... B.... as indemnity the actual loss and injury produced to said A.... B.... by said misconduct which is adjudged to be the sum of dollars together with

..... dollars, the costs and expenses of these proceedings, and that in default of the payment of said indemnity and costs and expenses the said L.... M.... be committed to the common jail of county until said indemnity and costs and expenses be paid, etc. [*as in last preceding form*].

[*In Minnesota the indemnity may be imposed in addition to the fine (Minn. Rev. Laws 1905 sec. 4649) but in Wisconsin it takes the place of the fine.*]

2022. The same, where imprisonment is ordered.

[*Proceed as in Form 2020 to the * and continue*]:

That as punishment for said misconduct the said L.... M.... be imprisoned in the common jail of county for the term of days from this date, or until he be thence discharged according to law. Let a commitment issue accordingly.

By the Court:

J.... K...., Circuit Judge.

2023. Commitment for civil contempt.

The State of to the Sheriff of the County of,

GREETING: Whereas, on the day of, 19..., upon proceedings duly brought before the court of county, L.... M.... was adjudged to be guilty of contempt of said court, in this, that [*here state the contempt found and adjudged, with certainty*].

And whereas it was then and there adjudged by this court that the said L.... M.... be punished by [*here state terms of judgment*].

Now therefore we command you that you take the body, etc. [*proceed as in Form 2001 conforming to the terms of the judgment*].

PART VI.

FORMS OF ORDERS AND JUDGMENTS.

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CHAPTER CXLII.

DISMISSAL FOR WANT OF PROSECUTION.

- | | |
|--|--|
| <p>2024. Affidavit to move for dismissal for failure to bring to trial within five years.</p> <p>2025. General form of affidavit to move for dismissal on the ground of failure to diligently prosecute.</p> <p>2026. Affidavit to move for dismissal for neglect to serve complaint.</p> <p>2027. Affidavit to move for dismissal for unreasonable neglect to serve other defendants.</p> <p>2028. Affidavit to move for dismissal for suing without leave of court.</p> <p>2029. Affidavit for dismissal because case has not been brought to trial within one year after reversal in supreme court (Wisconsin).</p> | <p>2030. Affidavit to move for dismissal of appeal from justice court for failure to bring cause to a hearing for two terms (Wisconsin).</p> <p>2031. Notice of motion for dismissal.</p> <p>2032. Order for judgment of dismissal.</p> <p>2033. The same, unless plaintiff serve summons within a specified time.</p> <p>2034. Judgment of dismissal, for failure to serve complaint.</p> <p>2035. Judgment of dismissal, general form.</p> <p>2036. Judgment of dismissal on plaintiff's own motion.</p> <p>2037. Judgment of dismissal of appeal from justice court for failure to bring to trial within two terms (Wisconsin).</p> |
|--|--|

2024. Affidavit to move for dismissal for failure to bring to trial within five years.¹

[*Title.*]

[*Venue.*]

J.... K.... being duly sworn says he is the attorney for the defendant in the above entitled action,* and that the same was commenced by personal service of the summons therein on the defendant on the day of, 19.. That issue was joined therein by the service of the defendant's answer on the day of, 19..

¹ Section 2811a Wis. Stats. 1898 provides that trial courts may dismiss, upon their own motion or on motion of either party, any action at issue which has not been brought to trial within five years

after its commencement. See *Rice v. Ashland County*, 108 Wis. 189, where this statute is construed. The default may be excused by affidavits showing that the delay was for the convenience

That more than five years has elapsed since the commencement of said action but that the same has never been brought to trial.

J.... K....

[*Jurat.*]

2025. General form of affidavit to move for dismissal on the ground of failure to diligently prosecute.²

[*State commencement of action and joining of issue as in last preceding form and proceed*]:

That said plaintiff noticed said cause of action for trial for the term 19.. of said court, but obtained a continuance thereof at said term, and has never since that time noticed the same for trial, although more than years have elapsed since the expiration of said term [*or otherwise fully state the facts showing unreasonable failure to prosecute fully*].

J.... K....

[*Jurat.*]

2026. Affidavit to move for dismissal for neglect to serve complaint.

[*Title.*]

[*Venue.*]

J.... K.... being duly sworn says that he is the attorney for the defendant in this action.

That this action was commenced by personal service of the summons on the defendant, Y.... Z...., upon the day of, 19.., as he is informed and believes, a copy of which is hereto annexed *.

That a notice of appearance and demand of a copy of the complaint herein was served on the plaintiff's attorney, on the day of last, by this deponent [*or, as appears from the affidavit of O.... P...., annexed hereto*]; but no copy of the complaint has been served to the knowledge or belief of deponent.

J.... K....

[*Jurat.*]

or at request of the opposing party. *Hine v. Grant*, 119 Wis. 332. Trial courts have the inherent power to require the diligent prosecution of actions irrespective of the statute, and to dismiss for failure so to prosecute upon a

showing of the facts. *Allard v. Smith*, 120 Wis. 22.

² Trial courts have inherent power to dismiss an action for failure to diligently prosecute the same. 6 Enc. Pl. & Pr. p. 904 and notes.

2027. Affidavit to move for dismissal for unreasonable neglect to serve other defendants.³

[*As in last preceding form to the *, continuing*]:

That the defendant W.... X.... is a necessary party to a complete determination of the matters in controversy, and to the protection of the rights of this defendant, as appears by the complaint [and the answer of this defendant].

III. That although the said W.... X.... might have been served with the summons in this action by reasonable diligence, the plaintiff has wholly omitted to serve him; and, as deponent is informed and believes, has made no efforts to do so, and said defendant W.... X.... has not appeared in this action, although days [*or, months*] have elapsed since the service of this defendant, and [*here state briefly the stage to which the cause has arrived*].

J.... K....

[*Jurat.*]

2028. Affidavit to move for dismissal for suing without leave of court.

[*Title.*]

[*Venue.*]

J.... K.... being duly sworn says that he is the attorney for the defendant in this action * and that the defendant is a receiver duly appointed by this court [*or, by the court of*], by an order of which a copy is hereto annexed.

II. That this action is brought against him as such receiver to recover an alleged debt due from said, etc., as appears by the complaint in this action on file.

III. That this action was, as this deponent is informed and believes, commenced without leave of court contrary to the rules and practice of this court.

J.... K....

[*Jurat.*]

2029. Affidavit for dismissal because case has not been brought to trial within one year after reversal in supreme court (Wis. Stats. 1898 sec 3072, as amended by Laws 1905 c. 365).

[*Proceed as in last preceding form to the **] that this action proceeded to judgment in favor of the plaintiff in this court on the day of, 19.., and that the defendant thereafter

³ See Iowa Code sec. 3764; N. Dak. Rev. Codes sec. 5481; S. Dak. Rev. Code C. P. sec. 310.

only appealed from said judgment to the supreme court of this state, and upon the hearing of such appeal the said judgment was wholly reversed, and a new trial of said action was ordered on the day of, 19.. That although more than one year has elapsed since the entry of such judgment in said supreme court the said plaintiff has failed and neglected to pay the taxed costs on such reversal, and has not procured the record of said cause to be remitted to this court, nor has he brought the said cause to trial; and deponent further says that the said action has not been continued for cause.

J.... K....

[*Jurat.*]

2030. Affidavit to move for dismissal of appeal from justice court for failure to bring same to a hearing for two terms (Wis. Stats. 1898 sec. 3766).

[*Proceed as in Form 2028 to the **] that said action was commenced in justice court before J.... P...., justice of the peace, and judgment was rendered therein for the defendant before said justice on the day of, 19..; that thereafter the plaintiff duly perfected his appeal from said judgment to this court and the return therein was duly filed in the office of the clerk of this court on the day of, 19..

That more than two terms of this court have elapsed since the filing of said return, to-wit [*name the terms*] but that the said appeal has not been brought to a hearing and that this affidavit is made for the purpose of moving for an order dismissing said appeal.

J.... K....

[*Jurat.*]

2031. Notice of motion for dismissal.

[*Title.*]

TAKE NOTICE, that on the affidavit of J.... K...., a copy of which is annexed, the undersigned will move the court, at a term to be held at, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, that the plaintiff's complaint in this action be dismissed [as against the defendant Y.... Z....], with costs, in favor of the said defendant; and that judgment of dismissal of the action be entered accordingly, with costs; and that the plaintiff may be ordered to pay the costs of this motion, and for such other or further relief as may be just.

[*Date.*]

J.... K....,
Defendant's Attorney.

[*Address.*]

2032. Order for judgment of dismissal.

[Title.]

[Caption as in Form 7.]

On reading and filing the affidavit of J.... K.... [and proof of due service of the notice of this motion], and on motion of said J.... P...., of counsel for defendant, and after hearing G.... H...., of counsel for plaintiff [or, no one appearing], in opposition:

ORDERED, that the plaintiff's complaint in this action be dismissed [as against the defendant Y.... Z....], with costs, in favor of the said defendant, but without prejudice to a new action by, etc.;⁴ and that a judgment be entered accordingly; and that the plaintiff pay to said defendant dollars, costs of this motion.

By the Court:

O.... P...., Judge.

2033. The same, unless plaintiff serve summons within a specified time.

[Add to the above]: unless the plaintiffs shall, within twenty days after the service of this order on them or their attorney, serve the summons on said W.... X.... and pay to the defendant Y.... Z.... the said motion costs and in case of the making of such service and the filing of due proof thereof and the payment of said costs then said motion is denied.

2034. Judgment of dismissal for failure to serve complaint.

[Title.]

[Caption as in Form 7.]

This action having been commenced by the service of the summons without a copy of the complaint upon the defendant, and the said defendant having on the day of, 19.., served upon the plaintiff's attorney a notice of appearance and demanded a copy of the complaint, and due proof having been given to the court of such notice and demand, and that no copy of the complaint has been served [and the court having made an order that unless plaintiff, within twenty days from service of such order, serve a copy of said complaint, this action would be dismissed; and due proof being produced by the affidavit of M.... N.... that said order was served on the plaintiff's attorney, on the day of, and that no copy of the complaint has been served, although more than twenty days have elapsed], now, on motion of M.... N.... for the defendant:

⁴ If the dismissal be upon mere formal objections it should be without prejudice to the bringing of a new action by the proper parties.

IT IS ADJUDGED, that the complaint be dismissed for want of service of a copy thereof, and that the defendant recover of the plaintiff dollars, his costs of the action [*or, the costs of this action taxed at dollars*].

By the Court:

O.... P...., Judge.

2035. Judgment of dismissal, general form.

[*Title.*]

[*Caption as in Form 7.*]

This action having been commenced by the service of summons on the defendant Y.... Z.... on the day of, 19.... *; and this court by order dated the day of, 19.., having ordered that the same be dismissed for the reason [*here state reason*] [*if the order contained provision allowing plaintiff to make service and avoid dismissal set out the terms thereof in full*].

And it having been made to appear to the court by the affidavit of J.... K.... that the plaintiff has not [*here negative performance of conditions*].

IT IS ADJUDGED that the complaint in this action be and is hereby dismissed, and that the defendant recover of the plaintiff his costs of action taxed at dollars.

By the Court:

O.... P...., Judge.

2036. Judgment of dismissal on plaintiff's own motion.

[*As in last preceding form to the **] and the said action having come on for trial on the day of, 19.., and the plaintiff having moved to dismiss the same for the reason that [*state grounds*].

IT IS ADJUDGED [*as in last preceding form*].

2037. Judgment of dismissal of appeal from justice court for failure to bring to trial within two terms (Wis. Stats. 1898 sec. 3766).

[*Title.*]

[*Caption as in Form 7.*]

It appearing to the court that this action was commenced in justice court [*recite proceedings as in Form 2030 showing statutory ground for dismissal*].

IT IS ORDERED and adjudged that the appeal herein be and the same is hereby dismissed and that the defendant recover his costs taxed at dollars.

By the Court:

O.... P...., Judge.

CHAPTER CXLIII.

JUDGMENT BY DEFAULT TAKEN BEFORE THE CLERK.

- | | |
|---|--|
| <p>2038. Notice of assessment of amount of recovery.</p> <p>2039. Affidavit of no answer.</p> <p>2040. Judgment on default after personal service.</p> <p>2041. Judgment, where the complaint was served with the summons.</p> <p>2042. Notice of application for judgment, part of plaintiff's claim admitted by the answer.</p> | <p>2043. Judgment thereon.</p> <p>2044. Order requiring payment by defendant of that part of plaintiff's claim admitted by the answer.</p> <p>2045. Statement admitting counter-claim.</p> <p>2046. Judgment thereon</p> |
|---|--|

2038. Notice of assessment of amount of recovery.¹

[Title.]

TAKE NOTICE, that the amount due to the plaintiff upon the instrument mentioned in the complaint, will be assessed [*or, if the action is not on a written instrument for the payment of money only, that the amount which the plaintiff is entitled to recover in this action will be ascertained*], and his costs and disbursements, the items whereof are herewith stated, will be adjusted by the clerk of, at his office, in, on the day of, 19. . ., at o'clock in the noon [Date.]

G. . . . H. . . . ,
Plaintiff's Attorney.

[Address to defendant's attorney.]

2039. Affidavit of no answer.

[Title.]

[Venue.]

G. . . . H. . . . being duly sworn says he is the attorney [*or one of the attorneys*] for A. . . . B. . . . the plaintiff in the above

¹ This notice is only necessary where the complaint is not verified and the defendant has appeared in the action. Wis. Stats. 1898 sec. 2891 subd. 1. It is unnecessary in Minnesota and Iowa. Minn. Rev. Laws 1905 sec. 4133 subd. 1; Iowa Code secs. 3733, 3788, 3789, 3791. In North Dakota and South Dakota judgment is en-

tered by the clerk in such cases, upon order of the court or the judge thereof. N. Dak. Rev. Codes secs. 5413, 5479; ¹ S. Dak. Rev. Codes C. P. secs. 237-309. In Nebraska the damages are assessed by the court or referred, or ascertained by a jury as the court directs. Cobbeys Ann. Stats. of Nebr. sec. 1422.

entitled action; that the summons [and complaint] in this action were duly and personally served on the defendant C.... D.... on the day of, 19.., as appears from the sheriff's return of service indorsed upon the summons herein; that no answer, demurrer [or notice of appearance] has been served upon or received by the plaintiff's attorneys in said action and that the time for answering has fully expired.

G.... H....

[*Jurat.*]

[*Proof of service or notice of appearance must be on file.*]

2040. Judgment on default after personal service.

[*Title.*]

[*Caption as in Form 7.*]

The summons herein having been personally served on the defendant Y.... Z...., on the day of, 19.., and he not having demanded a copy of the complaint [*or, having appeared by J.... K...., his attorney, and demanded a copy of the complaint, and the same having been served on said J.... K....*], and * no answer or demurrer having been served on the plaintiff's attorney [and the clerk having assessed the amount due]; now on motion of G.... H...., the plaintiff's attorney:

ADJUDGED, that the plaintiff A.... B.... do recover of the defendant Y.... Z.... dollars [*stating the amount, and interest, if any, mentioned in the summons, or assessed by the clerk*], together with dollars costs and disbursements, amounting in the whole to dollars.²

[*If the action is against several defendants jointly indebted upon contract, and only a part of them were served, add*]: But this judgment can be enforced only against the joint property of all the defendants herein, and the separate property of the said defendants [*naming them*], who were served as aforesaid [*and, if they are subject to arrest*], and against the persons of the said last named defendants.³

L.... M...., Clerk.

2041. Judgment, where the complaint was served with the summons.

[*Title.*]

The summons, and a copy of the complaint herein, having been personally served on the defendant Y.... Z.... more than

² Wis. Stats. 1898 sec. 2891 subd. 1; Minn. Rev. Laws 1905 sec. 4133 subd. 1.

³ Wis. Stats. 1898 sec. 2884 subd.

1; Minn. Rev. Laws 1905 sec. 4282 subd. 1; N. Dak. Rev. Codes sec. 5261 subd. 1; S. Dak. Rev. Code C. P. sec. 113 subd. 1.

twenty days before this date, and [*continuing as in preceding form from the **].

2042. Notice of application for judgment, part of plaintiff's claim admitted by the answer.⁴

[*Title.*]

TAKE NOTICE that upon the complaint and answer heretofore served herein the undersigned will apply to L.... M.... clerk of the court of county at his office in the city of on the day of, 19.., at 10 o'clock A. M. of that day, for the entry of judgment for the sum of dollars, being the amount of the plaintiffs claim herein which is admitted by said answer [*or being the amount of plaintiff's claim herein after deducting the amount of the defendant's counter-claim set forth in his answer*].

[*Date.*]

G.... H....,
Plaintiff's Attorney.

[*Address.*]

2043. Judgment thereon.⁵

[*Title.*]

This action having been commenced by personal service upon the defendant of the summons and complaint and the said defendant having answered to said complaint admitting the sum of dollars to be due the plaintiff upon the demand set forth in said complaint, * and the said plaintiff having given due notice to the defendant of application for judgment for the amount so admitted,

IT IS ADJUDGED that the plaintiff recover of the defendant the said sum of dollars, with costs taxed at dollars.

L.... M...., Clerk.

2044. Order requiring payment by defendant of that part of plaintiff's claim admitted by the answer.⁶

[*Proceed as in last preceding form to the **] and the plaintiff having duly moved, upon the pleadings, that the defendant be required to satisfy that part of plaintiff's claim so admitted be-

⁴ Wis. Stats. 1898 sec. 2892. This section is valid. Lathrop v. Snyder, 17 Wis. 110.

⁵ See note 4.

⁶ This is not a judgment but an order and must be made by the

court upon motion. Wis. Stats. 1898 sec. 2892; Sellers v. Union L. Co., 36 Wis. 398; Buffalo B. W. Co. v. Phillips, 64 Wis. 338; N. Dak. Rev. Codes sec. 5411; S. Dak. Rev. Code C. P. sec. 235.

fore proceeding to the trial of the issues raised by the answer, after hearing G.... H.... for the plaintiff and J.... K.... for the defendant,

IT IS ORDERED that said defendant within days from service upon him of a copy of this order do pay and satisfy that part of the plaintiff's claim so admitted, to-wit, the sum of dollars.

By the Court:

O.... P.... Judge.

2045. Statement admitting counter-claim.⁷

[*Title.*]

The plaintiff in this action hereby admits the counter-claim in the defendant's answer, and consents that the same, amounting to [*here state amount, with interest, if any*], be deducted from the amount demanded in the complaint.

[*Date.*]

G.... H....,
Plaintiff's Attorney.

[*In Minnesota add affidavit stating amount of plaintiff's costs and disbursements.*]

2046. Judgment thereon.⁸

[*Title of the cause.*]

The plaintiff having filed with the clerk a statement, admitting the counter-claim contained in the answer of the defendant [*or, defendants, naming them*], [together with an affidavit of his costs and disbursements] now, on motion of L.... M...., counsel for the plaintiff,

IT IS ADJUDGED, that the plaintiff recover of the defendant [*or, defendants, naming them*] dollars, being the excess of the plaintiff's claim over the said counter-claim, with dollars costs of the action, making together dollars.

⁷ Minn. Gen. Stats. 1894 sec. 5413 subd. 1; S. Dak. Rev. Codes 5354; N. Dak. Rev. Codes sec. C. P. 237 subd. 1.

⁸ See note 7.

CHAPTER CXLIV.

JUDGMENTS BY DEFAULT ON APPLICATION TO THE COURT.

- | | |
|---|---|
| 2047. Notice of application in ordinary case. | 2053. Order of reference to take proofs, service by publication. |
| 2048. Order for judgment and for reference or assessment of damages by jury in ordinary case. | 2054. Judgment, service by publication. |
| 2049. Order of reference to take an account. | 2055. Affidavit of no reply. |
| 2050. Judgment thereon. | 2056. Notice of motion for judgment for defendant on failure to reply to counter-claim. |
| 2051. Affidavit of default in case of service by publication. | 2057. Order for judgment for want of reply. |
| 2052. Undertaking for restitution, in case of substituted service. | 2058. Judgment thereon. |

2047. Notice of application in ordinary case.¹

[*Title.*]

TAKE NOTICE, that the plaintiff will apply to this court, at a term to be held at in the city of, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel may be heard, * for the relief demanded in the complaint.

[*Date.*]

G.... H....,
Plaintiff's Attorney.

[*Address to defendant's attorney.*]

[*Proof of service of summons or notice of appearance must be on file.*]

[*Affidavit of no answer, as in Form 2039.*]

2048. Order for judgment and for reference or assessment of damages by jury in ordinary case.

[*Title.*]

This action having come on for trial at this term of said court on the day of, 19.., and due proof having

¹ To be served on any defendant who has appeared in the action. subd. 2; N. Dak. Rev. Codes sec. 5413 subd. 2; S. Dak. Rev. Codes: Wis. Stats. 1898 sec. 2891 subd. 2; C. P. sec. 237 subd. 2. Minn. Rev. Laws 1905 sec. 4133

been made and filed showing personal service of the summons and complaint herein upon the defendants and each of them more than twenty days since, and that no answer or demurrer has been received from any of the said defendants [and, *if any defendants have appeared*, proof having been made of due service of notice of application for judgment upon Y.... Z.... who has appeared in said action], * now on motion of G.... H.... attorney for the plaintiff it is

ORDERED that the plaintiff have judgment against the defendant for the damages sustained on account of the cause of action set forth in the complaint with costs [*in replevin add*] and that he recover the possession of the personal property described in the complaint or the value thereof in case a delivery can not be had,

And further ordered that it be referred to R.... F...., Esq., of ** to take proof of the demand alleged in the complaint [*or specify the particular inquiry to be made*] and to examine the plaintiff or his agent on oath respecting any payments that have been made to the plaintiff, or his agent for his use, and to report to the court with all convenient speed.

[*Or*: Ordered that the damages sustained by the plaintiff by reason of the matters alleged in the complaint be assessed by a jury under the direction of the court.]

By the Court:

O.... P...., Judge.

2049. Order of reference to take an account.

[*As in last preceding form, substituting after the ***]: to take an account of the partnership transactions referred to in the complaint; and the parties are hereby required to produce before said referee, upon oath, all the books, papers, deeds, and other writings in their custody or control relating to the same, and shall be examined upon interrogatories, or otherwise, as the said referee shall direct [*add any other directions, if necessary*]. And said referee is further directed to make report to the court with all convenient speed.

2050. Judgment thereon.

[*Title*.]

[*As in Form 2048 substituting after the **]: and the damages sustained by the plaintiff by reason of the matters alleged in the complaint having been assessed by a referee appointed by the court [*or, by a jury under the direction of the court or by the court, the plaintiff having waived assessment by a jury*], now, on motion of M.... N.... for the plaintiff,

IT IS ADJUDGED, that the plaintiff recover of the defendant [or, defendants, *naming them*] dollars, the damages thus assessed, with dollars costs of the action, making together dollars.

By the Court:

O.... P...., Clerk.

2051. Affidavit or default in case of service by publication.²

[*Title.*]

[*Venue.*]

G.... H.... being duly sworn says that he is the attorney for the plaintiff in this action and,

I. That on the day of, 19.., an order was duly made herein for service of the summons upon the defendant Y.... Z.... by publication, which order is on file in this action.

II. That the summons and complaint were, on the day of, 19.., duly filed in the office of the clerk of

III. That the summons herein was duly served by publication, and by mailing the same with a copy of the complaint in all respects in compliance with the terms of said order of publication, as appears by the affidavits of O.... P.... and Q.... R.... annexed; that said service was completed on the day of, 19.., but that no answer or demurrer herein by said defendant has been served on the plaintiff's attorney, and said defendant has not appeared in the action; and that the time for answering said complaint or appearing in said action has fully expired.

[*Or in case of personal service outside of the state insert as follows:* III. That on the day of, 19.., said summons and complaint were personally served on said defendant pursuant to the terms of said order of publication at in the state of as appears by the affidavit of L.... M.... annexed hereto, but that no answer or demurrer, etc., *as above.*]

IV. Deponent further says, that on the day of, 19.., an attachment against the property of said was duly issued in this action, and delivered to the sheriff of county, by whom the same was, on the day of, 19.., at, levied on property belonging to the said defendant, whereof the following is a description [*insert a specific description of the property*]; and that the value of said property is dollars.

² Wis. Stats. 1898 sec. 2891 subd. 3; Minn. Rev. Laws 1905 sec. 4133 subd. 4; N. Dak. Rev. Codes sec.

5413 subd. 3; S. Dak. Rev. Codes C. P. sec. 237 subd. 3.

V. Deponent further says that said defendant is [or, is not, as the case may be] a resident of this state.

G.... H...

[*Jurat.*]

[*Attach affidavits showing due publication and mailing of personal service outside of the state using forms 159 and 160 or 161*].

2052. Undertaking for restitution, in case of substituted service.³

[*Title.*]

Whereas, in this action, in which service of the summons upon the defendant Y.... Z.... was made by publication [*or if by personal service outside the state, or other form of substituted service, recite the fact*] the plaintiff is about to apply to the court for judgment upon failure of the defendant to answer:

NOW, THEREFORE, we, M.... N...., of No., ... street, in the village of, merchant, and O.... P.... [*stating, in the same way, his residence and occupation, definitely*], do hereby, pursuant to the statute, undertake that said A.... B...., the plaintiff, will abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under or by virtue of such judgment, in case the defendant or his representatives shall apply and be admitted to defend the action, and shall succeed in such defense.

[*Date.*]

[*Signature.*]

[*Add justification as in Form 190, and approval, which may be as follows*]:

I hereby approve the above undertaking and the sufficiency of the sureties therein named.

[*Date.*]

Q.... R...., Judge.

2053. Order of reference to take proofs, service by publication.

[*Title.*]

[*Caption as in Form 7.*]

Upon the summons and complaint herein, and the affidavit of G.... H...., dated the day of, 19.., setting forth the proceedings had [and on motion of G.... H.... for the plaintiff]:

ORDERED, that it be referred to R.... F...., Esq., of, counsellor-at-law, to take proof of the demand alleged

³ See note 2.

in the complaint [*or specify particular inquiry*], and to examine the plaintiff, or his agent, on oath, respecting any payments that have been made to him, said plaintiff, or to any one, for his use, and to report to the court with all convenient speed.

By the Court:

O.... P...., Judge.

2054. Judgment, service by publication.

[*Title.*]

[*Caption as in Form 7.*]

The summons and complaint in this action having been filed in the office of the clerk of this court, on the day of, 19.., and, the defendant Y.... Z.... being a foreign corporation, having property within this state [*or state other statutory ground for service by publication*], service of the summons upon such defendant by publication having been ordered, and, pursuant to said order, the summons having been duly published in the, ... and the, once in each week for successive weeks commencing on the day of, 19..; and a copy of the summons and complaint having been duly mailed to [*or, having been thereafter personally served on*] said defendant Y.... Z.... [addressed to their president M.... N...., at] [*if there are other defendants who were personally served, or who have appeared, here state the proceedings as to them*] and no answer or demurrer having been served on the plaintiff's attorney, and the defendant having failed to appear, and an attachment having been issued against, and levied upon property belonging to the defendant Y.... Z...., and proof thereof made by the affidavit of G.... H....; and the defendant W.... X.... being a resident of this state, the plaintiff having now in court made proof of the demand mentioned in the complaint [*or, if the defendant is a non-resident, the defendant being not a resident of this state, the plaintiff having now in court made proof of the demand mentioned in the complaint*], and [G.... H...., the agent of] the plaintiff having now in court been examined on oath respecting any payments that have been made to the plaintiff, or to any one to his use, on account of such demand, whereby it appears that no such payments have been made [*or, if any were made, state the amount*]; and the plaintiff having produced an undertaking with two sureties, approved by the court, that he will make restitution according to the requirement of subd. 3 of section 2891 of the Wisconsin statutes of 1898 [*or otherwise state the section according to the fact*].

Now, on motion of G.... H...., plaintiff's attorney, it is

ADJUDGED that the plaintiff recover against the defendant.

Y.... Z.... the sum of dollars, together with his costs and disbursements taxed at dollars.

By the Court:

O.... P...., Judge.

2055. Affidavit of no reply.⁴

[*Title.*]

[*Venue.*]

J.... K.... being duly sworn, says that he is the defendant's attorney in this action. That the answer herein was served on the plaintiff's attorney on the day of, 19..; and that no copy of any reply or demurrer thereto has been served on deponent.

J.... K....

[*Jurat.*]

2056. Notice of motion for judgment for defendant on failure to reply to counter-claim.

[*Commencement as in Form 2047 to the * and continuing*]: for an order that for want of a reply or demurrer on the part of the plaintiff to the defendant's counter-claim, the said defendant have judgment against the plaintiff for dollars [*or, pursuant to the prayer of the answer of said defendant*], with costs of the action and of this motion, and for such other relief as may be just.

[*Date.*]

J.... K....,
Defendant's Attorney.

[*Address.*]

2057. Order for judgment for want of reply.

[*Title.*]

[*Caption as in Form 7.*]

The defendant's answer herein, setting up a counter-claim, having been duly served on the plaintiff more than twenty days since, and no reply or demurrer having been interposed by the plaintiff:

ORDERED, that judgment be entered herein in favor of the above-named defendant against the above-named plaintiff for the sum of dollars [*or state other relief sought*], besides the costs and disbursements of this action, together with ten dollars costs of this motion.

[*Or in case reference, or assessment of damages by a jury is necessary*]: ORDERED [*continue as in Form 2048 making appropriate changes of names of parties*].

⁴ Wis. Stats. 1898 sec. 2662; Codes sec. 5278; S. Dak. Rev. Minn. Rev. Laws 1905 sec. 4135; Codes C. P. sec. 131. Iowa Code sec. 3788; N. Dak. Rev.

2058. Judgment thereon.*[*Title.*][*Caption as in Form 7.*]

The defendant in this action, having duly served his answer on the day of last, setting up a counter-claim to the plaintiff's cause of action, and the plaintiff having failed to reply or demur thereto, now, on motion of M.... N.... for defendant:

IT IS ADJUDGED, that said defendant recover of the said plaintiff the sum of dollars together with his costs and disbursements herein taxed at dollars amounting in all to the sum of dollars.

[*Or in case of reference or assessment of damages by a jury, follow Form 2050.*]

By the Court:

O.... P...., Clerk.

* See note 4.

CHAPTER CXLV.

JUDGMENTS AND FURTHER PROCEEDINGS IN MORTGAGE FORECLOSURE ACTIONS.

- | | |
|---|--|
| 2059. Affidavit of default in mortgage foreclosure. | 2072. Sheriff's report of sale in foreclosure (Wisconsin). |
| 2060. Order of reference, general form, amount all due, no infant or absent defendants (Wisconsin). | 2073. Order confirming report of foreclosure sale (Wisconsin). |
| 2061. The same, infant and absentee defendants, amounts not all due (Wisconsin). | 2074. Sheriff's deed on foreclosure sale (Wisconsin). |
| 2062. Referee's report, amount all due. | 2075. Foreclosure judgment (Minnesota). |
| 2063. Schedule A, to be annexed to foregoing report. | 2076. Notice of sheriff's sale in foreclosure (Minnesota). |
| 2064. Schedule B, to be attached to foregoing report. | 2077. Report of foreclosure sale (Minnesota). |
| 2065. Referee's report, amount not all due. | 2078. Sheriff's certificate of sale on foreclosure by action (Minnesota). |
| 2066. Foreclosure judgment on default after reference, amount all due (Wisconsin). | 2079. Notice of redemption, to sheriff by redemptioner (Minnesota, North Dakota and South Dakota). |
| 2067. Foreclosure judgment on default, where proofs are taken by the court without reference (Wisconsin). | 2080. Sheriff's certificate of redemption in foreclosure (Minnesota). |
| 2068. Foreclosure judgment on default after reference, amount not all due (Wisconsin). | 2081. Certificate by owner of certificate of sale, of redemption in foreclosure (Minnesota). |
| 2069. Findings in foreclosure action where part of the defendants defend and others make default (Wisconsin). | 2082. Judgment of foreclosure and sale (North Dakota and South Dakota). |
| 2070. Judgment of foreclosure where contested issues were tried by court without reference (Wisconsin). | 2083. Special execution on foreclosure of mortgage (North Dakota and South Dakota). |
| 2071. Notice of sheriff's or referee's sale in foreclosure. | 2084. Notice of foreclosure sale (North Dakota and South Dakota). |
| | 2085. Sheriff's certificate of sale (North Dakota and South Dakota). |
| | 2086. Sheriff's report of foreclosure sale (North Dakota and South Dakota). |

- | | |
|--|--|
| <p>2087. Order confirming sheriff's report of sale (North Dakota and South Dakota).</p> <p>2088. Sheriff's certificate of redemption (North Dakota and South Dakota).</p> <p>2089. Sheriff's deed on foreclosure by action (North Dakota and South Dakota).</p> <p>2090. Judgment of foreclosure and sale (Nebraska).</p> <p>2091. The same, where a subsequent mortgagee is made defendant and his rights are determined (Nebraska).</p> <p>2092. The same, where part only of the debt is due and the premises can be sold in parcels (Nebraska).</p> <p>2093. The same, where the whole property is to be sold together (Nebraska).</p> <p>2094. Return of foreclosure sale and order of confirmation (Nebraska).</p> | <p>2095. Judgment of foreclosure and sale (Iowa).</p> <p>2096. Affidavit for taxation of stipulated attorney's fee (Iowa).</p> <p>2097. Special execution in foreclosure (Iowa).</p> <p>2098. Sheriff's certificate of sale (Iowa).</p> <p>2099. Affidavit on motion to set aside foreclosure sale.</p> <p>2100. Order setting aside sale and ordering resale.</p> <p>2101. Bond given as a condition of resale in foreclosure.</p> <p>2102. Affidavit on motion to compel purchaser to complete his purchase.</p> <p>2103. Order compelling purchaser to complete his purchase.</p> <p>2104. Affidavit of purchaser seeking to be discharged from his purchase.</p> <p>2105. Order discharging purchaser and ordering resale.</p> |
|--|--|

2059. Affidavit of default in mortgage foreclosure.

[Title.]

[Venue.]

G.... H.... being duly sworn says he is the attorney for the plaintiff in this action; that the summons and complaint in this action were duly and personally served on the defendant, C.... D...., on the day of, 19.., and the summons and notice of object of action herein were duly and personally served on the day of, 19.., on the defendants, E.... F.... and W.... X...., as appears by the sheriff's return of service duly indorsed on the summons and now on file]; * that the time for answering said complaint has expired, and that no answer or demurrer herein has been served on, or received by, the plaintiff's attorney, by, or from, any of said defendants, and that none of said defendants have in any manner appeared in this action, and that none of said defendants are infants or absentees.

[Or in case of absent defendants served by publication, or infant defendants, proceed as follows after the *] that the summons and complaint herein have been duly served on the defendant W.... X...., more than twenty days since, by publication and mailing, as appears by the affidavits of O.... P....

and Q.... R.... annexed, and the summons and notice of object of action have been duly served upon the defendant Y.... Z...., more than twenty days since, by publication and mailing, as appears by the affidavit of O.... P...., annexed;

That none of the said defendants have [appeared or] put in an answer or demurrer [except the defendant C.... D.... who has appeared but served no answer or demurrer] and there are no infant defendants [except the defendant L.... M...., who is an infant, and has by his guardian interposed the usual general answer, not controverting any material allegation of the complaint].

That none of the defendants are absentees [except the defendant W.... X...., who has been served by publication as aforesaid].

G.... H....

[*Jurat.*]

[*Attach affidavits of publication and mailing or personal service outside of state using Forms 159 and 160 or 161.*]

[*If any defendants have appeared, notice of application for judgment must be given and filed using Form 2047.*]

2060. Order of reference, general form, amount all due, no infant or absent defendants (Wis. C. C. Rule XXV),

[*Title.*]

The summons and complaint in this action having been duly and personally served on the defendant, C.... D...., on the day of, 19.., at said county, and the summons and notice of object of action herein having been duly and personally served on the defendants, E.... F.... and W.... X...., on the day of, 19.., and due proof of such service having been made and filed; and the time for answering having expired, and no answer, demurrer, nor notice of appearance having been served upon the plaintiff's attorney, or received by him, by or from, any of said defendants, and due proof of such default having been made and filed, and this action being for the foreclosure of a mortgage, upon the summons and complaint, and the papers and proofs on file.

Now, on motion of G.... H...., attorney for the plaintiff,

IT IS ORDERED, that it be referred to R.... F...., Esq., of, in said county, an attorney of this court, as referee, to compute the amount due the plaintiff, for principal and interest on the notes and mortgage described in the complaint [as well as the amounts due to such of the defendants as are prior incumbrancers] and to ascertain and report the situation of the mortgaged premises and whether they can be sold in parcels

without injury to the interests of the parties, and whether any and what portion thereof are held as a homestead, and report the same with such computation, and the proofs taken by him, to the court with all convenient speed.

[Date.]

O.... P...., Judge.

2061. The same, infant and absentee defendants, amount not all due (Wis. C. C. Rule XXV),

[Title.]

[Proceed with recitals of proof of service and default as in last preceding form adding a proper recital of proof of service by publication upon absentee defendants and answer of infant defendants if any, and if there has been appearance by any defendant recite same and the giving of notice of application for judgment.]

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ORDERED, that it be referred to R.... F...., Esq., an attorney of this court of, as referee, to compute the amount actually due to the plaintiff on the note and mortgage mentioned in said complaint [and to such of the defendants as are prior incumbrancers of the mortgaged premises]; also to take proof of the facts and circumstances stated in the complaint and to examine the plaintiff or his agent on oath as to any payments which have been made; and also, to ascertain and report the amount of each installment of principal and interest secured to be paid by said note and mortgage and hereafter to grow due, and the several times when they become due; and also, to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels without injury to the interests of the parties; and whether any and what portion thereof are held as a homestead and if he shall be of opinion that a sale of the whole of said premises, in one parcel, will be most beneficial to the parties, then that he report his reasons for such opinion; and that he make report with all convenient speed.

[Date.]

By the Court:

O.... P...., Judge.

2062. Referee's report, amount all due.

[Title.]

To the Court of County:

Pursuant to the order of reference in this action dated, 19.., whereby it was referred to the undersigned to ascertain, etc. [*here recite matters referred*]. *

I DO HEREBY REPORT that having taken the oath as referee required by law, I have computed and ascertained the amount due the plaintiff upon the said note and mortgage, and that there is due to the plaintiff for principal and interest therein at this date the sum of dollars, besides the sum of dollars, solicitor's fee stipulated in said mortgage, amounting in all to the sum of dollars. Schedule A, hereunto annexed, as a part of this report, shows a statement of the amounts due for principal and interest respectively, the period of the computation of the interest, and its rate, and the amount of said solicitor's fees.

A further report that there are no prior incumbrances of the mortgaged premises [*or if there are prior incumbrances*] that the following defendants have prior incumbrances, of the dates, amounts and descriptions hereinafter given, upon which incumbrances there are due respectively the amounts set opposite said incumbrances [*here insert nature, dates and amounts of the prior incumbrances*]. **

I further report that I have examined as to whether the mortgaged premises can be sold in parcels, and as to whether any and what portion thereof is held as a homestead, and I find that the mortgaged premises are situated as follows [*here state briefly situation of the premises*], and, that in my opinion, the same can be sold in parcels without injury to the interests of the parties [*or if they cannot be so sold*] that a sale of the whole of said premises in one parcel would be most beneficial to the parties, for the reason that the same consist of a single house and lot which cannot be divided [*or otherwise state reason according to the facts*].

I further report that a portion of the mortgaged premises is held as a homestead by C.... D.... described as follows [*insert description*] [*or, that no portion of said mortgaged premises is held as a homestead*].

I further report that I reduced the testimony taken by me to writing and herewith return the same as a part of my report and attached hereto, marked Exhibit B.

[Date.]

R.... F...., Referee.

[Attach referee's oath as in Forms 1948-1952.]

2063. Schedule A, to be annexed to foregoing report.

I. One note dated, 19.., due, 19..	
Principal	\$1,000
Interest thereon at 6 per cent., ... months	
days	35

II. One note dated, 19.., due, 19..,	
Principal	500
Interest thereon, etc. [<i>as above</i>]	5
Total principal and interest due.....	\$1,540
Solicitor's fee	50
Total amount due	\$1,590
	R.... F....,
	Referee.

2064. Schedule B, to be attached to foregoing report.[*Title.*]

TESTIMONY TAKEN BEFORE R.... F...., REFEREE, IN THE ABOVE
ENTITLED ACTION.

The plaintiff first offered in evidence the note and mortgage described in the complaint which are attached hereto and marked Exhibits 1 and 2 respectively. Plaintiff then offered in evidence a duly certified copy of the notice of pendency of action herein which was filed in the office of the register of deeds, ..., 19.., which copy is attached hereto and marked Exhibit 3.

[*Any other written evidence produced may be set forth in the same manner.*]

The following witnesses were sworn:

[*Venue.*]

A.... B.... being duly sworn says, I am the plaintiff in the within action [*state amount due, payments made, etc.*].

A.... B....

[*Jurat.*][*Venue.*]

L.... M.... being duly sworn says [*state situation of premises showing whether it can be sold in parcels to advantage, whether any part is a homestead, etc.*]

L.... M....

[*Jurat.*]

[*If insurance premiums are to be recovered or taxes have been paid show the facts by the witnesses.*]

2065. Referee's report, amount not all due.

[*Proceed as in Form 2062 to the * and continue as follows*]:

I DO HEREBY REPORT that, having taken the oath as referee as required by law, I have taken proof of the facts and circumstances stated in said plaintiff's complaint, and have exam-

ined the plaintiff [*or, the agent of the plaintiff*] on oath as to any payments which have been made on account of the demand mentioned in said complaint, and which ought to be credited thereon, and I am of opinion, and hereby report, that the facts and circumstances stated in said complaint are true; and that I have computed and ascertained the amount due the plaintiff upon and by virtue of the said note and mortgage, and I find, and report, that there is due to the plaintiff for principal and interest on the said note and mortgage, at the date of this report the sum of dollars, beside the sum of dollars solicitor's fee stipulated in said mortgage, amounting in the aggregate to the sum of dollars. Schedule A, hereunto annexed, forming part of this my report, shows a statement of the amounts due for principal and interest respectively, the period of the computation of the interest, and its rate, and the amount of said solicitor's fee.

I further report that there are no prior incumbrancers of the mortgaged premises [*or if there are prior incumbrances*] that the following defendants have prior incumbrances, of the dates, amounts and descriptions hereinafter given, upon which incumbrances there are due respectively the amounts set opposite said incumbrances: [*list of incumbrances, and amount due on each.*]

I further report that the amount of each installment of principal and interest secured to be paid by the said note and mortgage, and hereafter to grow due, and the several times when they become due, is shown by Schedule B, hereunto annexed and made a part of this my report.

[*Continue as in Form 2062 after the **.*]

[*Attach referee's oath of office, also Schedule A as in Form 2063, Schedule B giving a tabulated statement of amounts of principal and interest to grow due with dates of maturity, and Schedule C giving the testimony taken as in Schedule B, to Form 2064.*]

2066. Foreclosure judgment on default after reference, amount all due (Wis. Stats. 1898 chapter 135, C. C. Rule XXV),

[*Title.*]

[*Caption as in Form 7.*]

This action having come on to be heard and due proof having been made and filed showing personal service of the summons and complaint herein on the defendants C.... D.... and E.... F.... and of the personal service of the summons and notice of object of action upon the defendants Q.... R.... and R.... S.... [and of the service of the summons and notice of object of action upon W.... X.... (*absent defendant*) by publication and mailing in pursuance of an order of this court, and as ir

said order directed]; and it appearing by the affidavit of G.... H...., attorney for the plaintiff, that the time for answering said complaint has expired on the part of all of said defendants and that no answer, demurrer or notice of appearance has been served upon or received by him [except the answer of the defendant R.... S.... who is an infant and whose answer by his guardian does not deny any of the material allegations]; and it further appearing by due proof that due notice of the pendency of this action was duly filed in the office of the register of deeds of county on the day of, 19.., * and an order of reference having been made to L.... M...., Esq., to compute the amount due to the plaintiff upon the note and mortgage set forth in the complaint and to such of the defendants as are prior incumbrancers, and to examine and report whether the mortgaged premises can be sold in parcels and whether any and what portion thereof are held as a homestead, [*and if any of defendants are infants, having put in general answer, or are absentees, add,* and to take proof of the facts and circumstances stated in the complaint, and examine the plaintiff or his agent on oath as to any payments made, and which ought to be credited on said bond and mortgage], and on reading and filing the report of the said referee by which report, bearing date the day of, 19.., it appears that there was due on said note and mortgage at the date of said report ** the sum of dollars and dollars for a solicitor's fee as stipulated in said mortgage, and that said premises can be sold in parcels without injury to the interests of the parties and that no part thereof is a homestead.

Now, on motion of G.... H...., Esq., attorney for the plaintiff,

IT IS ORDERED AND ADJUDGED by the court that the said report be, and the same is hereby confirmed, and that there is due to the plaintiff, for principal and interest on said note and mortgage, the sum of dollars, and for solicitor's fee, secured by said mortgage, the further sum of dollars, which sum is a reasonable fee.

It is further ordered and adjudged, that the mortgaged premises hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal and interest upon said note and mortgage and for the said solicitor's fee and costs, and which may be sold separately without material injury to the parties interested, be sold at public auction, in the county of, by and under the direction of the sheriff of the county of [*or, of R.... F...., Esq., who is hereby appointed a referee for that purpose*] at any time after one year from the date of this judgment, unless previous to such sale

said premises and said judgment shall be redeemed in the manner provided by law, by the payment of the amount of such judgment and costs, and interest thereon at the rate of six per cent. per annum, and all subsequent costs incurred thereon.

And it is further ordered and adjudged, that in case of sale pursuant hereto, the said sheriff [*or, referee*] give public notice of the time and place of such sale, in the manner provided by law; that either or any of the parties to this action may purchase at such sale; that the said sheriff [*or, referee*] upon the compliance, on the part of the purchaser, with the terms of such sale, do make, execute and deliver to the purchaser or purchasers a deed of the premises so sold, setting forth each tract or parcel of the lands or lots so sold, and the sum paid therefor; that out of the money arising from such sale, after deducting the amount of his fees and expenses of such sale, the said sheriff [*or, referee*] pay to the plaintiff or his attorney, the sum of dollars and cents, adjudged to plaintiff for cost and disbursements, and said sum of dollars solicitor's fees, with interest thereon from the date hereof, at the rate of — per cent. per annum, and also the sum of dollars [*principal and interest on mortgage*] with interest at said rate, from the date hereof, or so much thereof as the purchase money of the mortgaged premises will pay of the same, take a receipt therefor, and file it with his report of sale; that he the said sheriff [*or, referee*] deposit the surplus money, if any, arising from the sale of said mortgaged premises under this judgment, with the clerk of this court, subject to the further order of this court, and that he make a report of such sale, and file it with the clerk of this court within the time required by law.

And it is further ordered, that if the proceeds of such sale be insufficient to pay the amounts aforesaid, the said sheriff [*or, referee*] specify the amount of such deficiency in his report of sale, and that upon the filing and confirmation of said report, judgment be rendered against the defendant C.... D...., who is personally liable for the payment of the debt secured by said mortgage, for the amount of such deficiency, with interest thereon from the date of such last mentioned report, and that the plaintiff have execution therefor.

And it is further ordered and adjudged, that after the confirmation of the sale of said mortgaged premises as aforesaid, the purchaser or purchasers at such sale, his, or their heirs or assigns, be let into possession of the premises so sold, on production of the said sheriff's [*or, referee's*] deed or deeds, or a duly authenticated copy thereof. And that each and every of the parties to this action, who may be in possession of the premises described in such deed or deeds, and every other person who

since the filing of such notices of the pendency of this action has come into possession of the same, or any part thereof, under them or either of them, shall deliver to such grantee or grantees, named in such deed or deeds, his or their heirs or assigns, possession of such portion of said mortgaged premises as shall be described in such deed or deeds, or an authenticated copy or copies thereof.

And it is further ordered and adjudged, that the defendants, and their heirs respectively, and all persons claiming under them, or any or either of them, after the filing of such notice of pendency of this action be forever barred and foreclosed of all right, title, interest, and equity of redemption in said mortgaged premises, except the right of redemption before sale, as provided by statute.

And it is further ordered and adjudged, that the plaintiff may pay any taxes on said mortgaged premises which shall hereafter and before sale become due and have a lien on said premises for the amount so paid with interest thereon at — per cent. per annum, and that in case of such payment he may, upon application to the court on notice to all parties who have appeared in the action, obtain an order at the foot of the judgment directing that the amount so paid with interest be paid out of the proceeds of the sale of said premises.¹

The following is a description of the mortgaged premises hereinbefore mentioned [*describe premises*].

And it is, on like motion, further ordered and adjudged, that the said defendants [*name defendants in possession*] and all persons claiming under them, be, and they are, and each of them is, hereby enjoined from committing waste upon said mortgaged premises, and from doing any other act that may impair the value of the said mortgaged premises, at any time between the date of this judgment and the date of such sale, unless meanwhile said premises shall have been duly redeemed as provided by law.

Dated this day of, 19..

By the Court:

C.... K...., Clerk.

STATEMENT.

C.... K....,	}	Amount due	\$....
Clerk.		Costs — Statutory..	\$....
Judgment docketed the		Solicitor's Fees..	
.... day of, 19..,			\$....
at o'clock, ..M.			

¹ The rate of interest on all sums after judgment is the mortgage rate, not exceeding however six per cent. Wis. Stats., 1898

secs. 3164, 3165. Mil. Trust Co. v. Van Valkenberg (Wis.), decided Sept. 24, 1907.

2067. Foreclosure judgment on default, where proofs are taken by the court without reference (Wisconsin).

[*Proceed as in Form 2066, to the * and continue*]: and proofs of the matter and things alleged in the complaint having been duly taken in open court, from which proofs so taken it satisfactorily appears that there is now due on said note and mortgage [*continue as in Form 2066 after the ***].

2068. Foreclosure judgment on default after reference, amount not all due (Wis. Stats. 1898 sec. 3157).

[*Proceed as in Form 2066 to the * and continuing*]: and an order of reference, having been duly made to L.... M...., Esq., to compute, ascertain and report the amount now due to the plaintiff upon the note and mortgage set forth in the complaint, and to such of the defendants as are prior incumbrancers of the mortgaged premises, and also to ascertain and report the amount of each installment of principal and interest secured to be paid by said note and mortgage and hereafter to grow due, and the several times when they become due, and also to ascertain and report the situation of the said mortgaged premises, and whether in his opinion the same could be sold in parcels without injury to the interests of the parties; and if he should be of the opinion that a sale of the whole of said premises in one parcel would be most beneficial to the parties, then that he report his reasons for such opinion and to ascertain and report whether any part of said premises is a homestead; and also to take proof of the facts and circumstances stated in the plaintiff's complaint, and to examine the plaintiff or his agent on oath as to any payments which have been made.

And the report of the said referee having been duly filed, by which report, bearing date the day of, 19.., it appears that at the date of said report there was due the plaintiff . . on said note and mortgage the sum of dollars, and for solicitor's fee the sum of dollars which is a reasonable fee, besides the taxable costs and disbursements, and that there is to become due thereon as follows, to-wit [*here state installments of principal and interest to become due*], and it further appearing from said report that the said mortgaged premises are so situated that they cannot be sold in parcels without material injury to the interests of the parties and that no part thereof constitutes a homestead [*or if the conclusions of the referee are to the contrary state them*].

Now, on motion of G.... H...., Esq., attorney for the plaintiff,

IT IS ORDERED AND ADJUDGED by the court that the said report be, and the same is hereby confirmed, and that there is now due to the plaintiff, for principal and interest on said note and mortgage, the sum of dollars, and for solicitor's fees, secured by said mortgage, the further sum of dollars, which sum is a reasonable fee, and also the sum of dollars for costs and disbursements; and to become due for principal and interest at the dates aforesaid, the sums aforesaid, viz. *[state amounts and dates]*. And it is further adjudged that the said premises can not be sold in parcels without material injury to the interests of the parties and that no part of said premises constitutes a homestead *[or if the fact be otherwise state the parcels into which it may be divided and sold and what part constitutes a homestead]*.

It is further ordered and adjudged, that the mortgaged premises described in the complaint in this action, and hereinafter described, or so much thereof as may be sufficient to discharge the amount now due to the plaintiff for principal, interest, solicitor's fees and costs, and the said installments which shall hereafter grow due before the sale, and which may be sold separately without material injury to the parties interested, be sold at public auction *[if the finding is that sale can be made in parcels specify here that a parcel, describing it, be sold instead of the whole premises]* in the county of by and under the direction of the sheriff of county *[or, R.... F...., Esq., a referee for that purpose]*, unless before such sale, the said defendant C.... D.... pay, or cause to be paid, to the plaintiff or his attorney or assigns, or bring into court, the amount actually due, as aforesaid, at the time of such payment, with interest thereon at the rate of per cent. per annum, and all costs and expenses as taxed, including solicitor's fee as herein adjudged, with interest at said rate, and all subsequent costs, and any sums paid by the plaintiff subsequent to this judgment for or in redemption of taxes assessed upon said mortgaged premises, with interest at the same rate from the date of payment; that in case of such payment the proceedings herein shall be stayed until the further order of the court for the enforcement of this judgment; that no such sale shall be made until the expiration of one year from the date of this judgment, unless the parties hereto, by stipulation in writing, filed with the clerk of the above entitled court, consent to an earlier sale; that in case of sale, the said sheriff *[or, referee]* give public notice of the time and place of such sale in the manner provided by law; that either or any of the parties to this action may purchase at such sale; that the said sheriff *[or, referee]* upon the compliance on

the part of the purchaser with the terms of such sale, do make, execute and deliver to the purchaser or purchasers a deed of the premises so sold, setting forth each tract or parcel of the lands or lots so sold, and the sum paid therefor; that out of the money arising from such sale, after deducting the amount of his fees and expenses of such sale, the said sheriff [*or, referee*] pay to the plaintiff or his attorney the sum of dollars and cents, adjudged to said plaintiff for costs and disbursements, and said sum of dollars solicitor's fees, with interest thereon from the date hereof, at the rate of — per cent. per annum; and also the aforesaid sum of dollars, now actually due, and such further sums as shall have become due at the time of sale upon said note and mortgage, and interest on such sums as hereinbefore adjudged, or so much thereof as the purchase money of the mortgaged premises will pay of the same, take a receipt therefor, and file it with his report of sale; that the said sheriff [*or, referee*] deposit the surplus money, if any, arising from the sale of the said mortgaged premises under this judgment, with the clerk of this court, subject to the further order of this court, and that he make a report of such sale, and file it with the clerk of this court within the time required by law.

And it is further ordered, that if the proceeds of such sale be insufficient to pay the amount actually due, as aforesaid, at the time of sale, the said sheriff [*or, referee*] specify the amount of such deficiency in his report of sale, and that upon the filing and confirmation of said report, judgment be rendered against the defendant C.... D...., who is personally liable for the payment of the debt secured by said mortgage, for the amount of such deficiency, with interest thereon from the date of such last mentioned report, and that the plaintiff have execution therefor.

And it is further ordered and adjudged, that after the confirmation of the sale of said mortgaged premises as aforesaid, the purchaser or purchasers at such sale, his or their heirs or assigns, be let into possession of the premises so sold, on production of the said sheriff's [*or, referee's*] deed or deeds, or a duly authenticated copy thereof. And that each and every of the parties to this action, who may be in possession of the premises described in such deed or deeds, and every other person who since the filing of such notice of the pendency of this action has come into possession of the same, or any part thereof, under them or either of them, shall deliver to such grantee or grantees, named in such deed or deeds, his or their heirs or assigns, possession of such portion of said mortgaged premises as shall be

described in such deed or deeds, on production of such deed or deeds, or an authenticated copy or copies thereof, of the aforesaid mortgaged premises or any portion thereof.

And it is further ordered and adjudged, that the defendants, and their heirs respectively, and all persons claiming under them, or any or either of them, after the filing of such notice of pendency of this action, be forever barred and foreclosed of all right, title, interest, and equity of redemption in said mortgaged premises, except the right of redemption before such sale, as provided by statute.

And it is further ordered and adjudged, that the plaintiff may pay any tax on said mortgaged premises which shall hereafter and before sale become due and have a lien on said premises for the amount so paid with interest thereon at — per cent. per annum, and that in case of such payment he may upon application to the court on notice to all parties who have appeared in the action obtain an order at the foot of this judgment, directing that the amount so paid with interest be paid out of the proceeds of the sale of said premises.²

The following is a description of the mortgaged premises hereinbefore mentioned [*describe premises*].

And it is, on like motion, further ordered and adjudged, that the said defendants and all persons claiming under them, be, and they are, and each of them is, hereby enjoined from committing waste upon said mortgaged premises, and from doing any other act that may impair the value of said mortgaged premises, at any time between the date of this judgment and the date of such sale, unless meanwhile said premises shall have been duly redeemed as provided by law.

And in case the said mortgaged premises shall, before such sale, be redeemed from the effect of this judgment, in the manner hereinbefore provided, or in case there shall be subsequent default in the payment of any installment of principal or interest, it is further adjudged, that said plaintiff be at liberty at any time hereafter, when any principal or interest secured by said note and mortgage, shall become due, according to the conditions of the said note, to apply to the court, on the foot of this judgment, for a further order of the court upon any subsequent default in the payment of any portion or installment of the principal or of any interest, for a sale of so much of said premises as will be sufficient to satisfy the amount which shall then be due, with interest, and the costs of such petition and the sub-

² The rate of interest on all sums after judgment is the mortgage rate, not exceeding however six per cent. Wis. Stats. secs. 3164,

3165. Mil. Trust Co. v. Van Valkenberg (Wis.), decided Sept. 24, 1907.

sequent proceedings thereon; provided, however, that no such sale shall be made until the expiration of one year after such installment shall become due.

Dated the day of, 19..

By the Court:

C.... K...., Clerk.

STATEMENT.

Judgment docketed the	}	Amount Due	\$....
.... day of, 19..,		Costs — Statutory..	\$....
at o'clock, ..M.		Solicitor's Fees..	
C.... K....,			
Clerk.			\$....

2069. Findings in foreclosure action, where part of the defendants defend and others make default (Wisconsin).

[*Title.*]

The issue in this action arising on the answer of the defendant, E.... F...., to the complaint, coming on for trial at said term, on the day of, 19.., and having been tried before me, G.... H...., Esq., appearing for the plaintiff, and J.... K...., Esq., appearing for the defendant, E.... F...., I make and file the following FINDINGS OF FACT in said action:

1. I find that the defendant C.... D.... on the day of, 19.., duly executed and delivered to the plaintiff, etc. [*find execution of note and mortgage*].

2. That there is due upon the said note and mortgage the sum of dollars for principal and interest.

3. That there is also due the sum of dollars, as solicitor's fee, which I find to be a reasonable fee.

[4. That there is to become due on said bond and mortgage, as follows, on the day of, 19.., the sum of dollars, for principal and interest.]

[*Follow with other findings upon the controverted issues made by the pleadings.*]

And as CONCLUSIONS OF LAW I find:

1. That the plaintiff is entitled to the relief demanded in the complaint.

2. And it appearing from proofs duly taken in open court, upon the trial, that the mortgaged premises are so situated that they can not be sold in parcels without injury to the interests of the parties, and that a sale of the whole will be most beneficial to them, I so find and determine.

And it appearing by proofs duly made and filed that due per-

sonal service of the summons and complaint in this action was made on the defendants, C.... D.... and W.... X...., on the day of, 19.., and that the time for answering has expired, and that no answer or demurrer has been received from either of said defendants by the plaintiff's attorney, nor served upon him, and that neither of said last named defendants have appeared in this action.

And it further appearing by due proofs made and filed, that due notice of the pendency of this action was duly filed, after the filing of the complaint herein, and on the day of, 19.., in the office of the register of deeds of county, in the manner and form as required by law.

On motion of G.... H...., Esq., attorney for the plaintiff,
IT IS ORDERED, That judgment of foreclosure and sale of the mortgaged premises, in the usual form as provided by law, be rendered in this action.

By the Court:

O.... P...., Judge.

2070. Judgments of foreclosure, where contested issues were tried by court without reference (Wisconsin).

[*Title.*]

[*Caption as in Form 7.*]

The issues in this action having been tried before the court and the court having made its findings of fact and conclusions of law herein which are on file in this court [*It is unnecessary to recite the findings of fact or conclusions of law but care should be taken to see that they contain not only findings on all the issues of fact litigated but also findings on all formal matters such as the filing of the notice of pendency of action, the amounts due and to grow due, the feasibility of selling in parcels, etc.*],

Now, therefore, on motion of G.... H...., Esq., plaintiff's attorney,

IT IS ORDERED and adjudged, etc. [*follow with judgment as in either Form 2066 or 2068 according to the case made*].

2071. Notice of sheriff's or referee's sale in foreclosure.

[*Title.*]

By virtue of a judgment of foreclosure and sale, made in the above-entitled action on the day of, 19.., the undersigned sheriff of county, state of [*or, a referee for that purpose duly appointed*] will sell, at, in, on the day of, 19.., at o'clock in the noon of that day, the real estate and mortgaged premises

directed by said judgment to be sold, and therein described as follows [*describe premises, each lot separately.*]

Terms of sale cash.

[*Date.*]

R.... F....,
Sheriff [*or Referee*].

G.... H...., Plaintiff's Attorney.

2072. Sheriff's report of sale in foreclosure (Wisconsin).

[*Title.*]

To the Hon. Court of County:

By virtue of a judgment of this court, made in the above entitled action, on the day of, 19.., by which it was, among other things, ordered and adjudged that all and singular the mortgaged premises mentioned in the complaint in this action, and hereinafter described, be sold at public auction, by or under the direction of the sheriff of the county of where the said mortgaged premises are situate, I, L.... M...., the sheriff of the county of aforesaid, in the state of Wisconsin, do respectfully certify and report,

That at the request of the plaintiff's attorney, and as directed by said judgment, I advertised said premises to be sold by me at public auction, at in the of in said county; at o'clock in the noon, on the day of, 19..; that previous to said day of sale, I caused notice thereof to be publicly advertised for six weeks successively, as follows, to-wit: By causing a copy of such notice to be printed once in each week, during the six weeks immediately preceding said sale, in the N.... Z...., a public newspaper printed in said county of, which notice contained a brief but intelligible description of the said mortgaged premises, the first publication being on the day of, 19.., a printed copy of which notice is attached to the printer's affidavit of publication hereto annexed.

And I do further certify and report that I caused like printed notices to be fastened up in three public places in the town of, in said county, where the premises are situated; and also caused like printed notices to be fastened up in three public places in the city of, where said premises were sold, six weeks before said sale; that at o'clock in the noon, on the day of, 19.., the day and hour on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place so as aforesaid fixed for said sale. [And I adjourned the said sale for from that day, to-wit: to the hour of o'clock in the noon of the day of, 19.., and there and then made public proclamation of

such adjournment, and also gave public notice of such adjournment by printing a notice thereof in said newspaper, weekly from the day of sale at first so fixed, as aforesaid, to the said adjourned day, in the same place and manner in which said original notice was printed.]

And I do further report that at o'clock in the noon of the day of, 19.., the day on which the said premises were to be sold, pursuant to adjournment and notice thereof, I attended at the time and place as aforesaid, fixed by said adjournment for said sale, and exposed said premises for sale at public auction, to the highest bidder, and the said premises were then and there fairly struck off, as follows, to-wit: to M.... N.... for the sum of dollars, he being the highest and best bidder and that being the highest sum bidden therefor and the sum paid for the same.

[*Or, where there are several parcels:* that the several lots or parcels of land so directed to be sold as aforesaid, were put up for sale separately, and were each and every of them fairly struck off and sold to the several purchasers hereinafter named as follows, for the following sums respectively [*here name the purchasers, parcels and prices*]; those sums being the highest sums bid for the said lots respectively, and the said purchasers being respectively the highest bidders therefor; which several sums amount, in the aggregate, to dollars, and all of which sums have been paid.]

And I do further certify and report that I have executed, acknowledged and delivered to said purchaser [*or, purchasers*] a good and sufficient deed of conveyance [*or, good and sufficient deeds*] for the same, and have paid over or disposed of the purchase money, or proceeds of said sale as follows, to-wit: I have paid to the plaintiff's attorney the sum of dollars, being the amount of costs, etc., of this action as taxed, and have taken a receipt therefor, which is hereunto annexed. I have retained in my hands the sum of dollars, being the amount of my fees, commissions and disbursements on said sale, as will appear by reference to the statement hereto annexed, to which reference is made. I have also paid to the plaintiff's attorney the sum of dollars, and have taken a receipt therefor, which is hereto annexed. And the balance of the proceeds of said sale, amounting to the sum of dollars, I herewith bring into court to abide the further order thereof.

I further certify, that the premises so sold and conveyed as aforesaid, were described in said judgment, and in the deed [*or, deeds*] of sale and conveyance so executed by me as aforesaid,

as follows, to-wit [*here describe premises; if sold in parcels describe each parcel as sold*].

Dated the day of, 19..

L.... M....,

Sheriff County.

Received, ..., 19.., from L.... M...., the sheriff of county, who made sale of the premises under and by virtue of the judgment, mentioned in the annexed report, the sum of dollars, being the amount of costs, etc., in the cause in which said judgment was rendered, as taxed, which costs are paid to me by said sheriff, under and by virtue of the provisions of said judgment.

E.... F....,

Plaintiff's Attorney.

Received, ..., 19.., from L.... M...., the sheriff of county, who made the sale of the premises under and by virtue of the judgment, mentioned in the annexed report the sum of dollars, which sum being part of the proceeds of the sale of said premises, is received by me under and by virtue of the provisions of said judgment, being the amount adjudged to be paid to said plaintiff, with interest thereon, as mentioned in said judgment.

E.... F....,

Plaintiff's Attorney.

Note of sheriff's fees and disbursements in and about the sale mentioned in the annexed report:

Making Report of Sale annexed.....	\$.....
Advertising and Affidavit.....	
Sheriff's Fees	

\$.....

[*Venue.*]

X.... Y...., being duly sworn, does depose and say that he is the foreman of the printers of the N.... Z.... which is a public newspaper of general circulation, published in the of and county of, state of Wisconsin; that a notice of sale, of which a printed copy is hereto annexed, has been published in said newspaper, once in each week, for six weeks successively, next before the day of sale mentioned therein, and that said printed copy was taken from such newspaper.

X.... Y....

[*Jurat.*]

[*Attach copy of notice.*]

2073. Order confirming report of foreclosure sale (Wisconsin).

[*Title.*]

[*Caption as in Form 7.*]

On reading and filing the report of R.... F...., sheriff of the county of [*or, referee*], appointed to make sale of the

premises described in the complaint herein, which report bears date the day of, 19.., it appearing by due proof that due notice of the motion to confirm said report and sale has been given to all parties who have appeared in this action;

And it appearing that the said sheriff [*or, referee*] in making said sale has in all things complied with the judgment heretofore entered in this cause, and the statute in such case made and provided;

Now, on motion of G.... H...., plaintiff's attorney,

IT IS ORDERED that the said report be, and the same is hereby in all things confirmed.

By the Court:

O.... P...., Judge.

2074. Sheriff's deed on foreclosure sale (Wisconsin).

THIS INDENTURE, made the day of, 19.., between L.... M...., sheriff of the county of, of the first part, and M.... N.... of of the second part,

WITNESSETH, that whereas, at the term of the court, state of Wisconsin, held in and for the county of at the court house in the city of in said county, on the day of, 19.., it was, among other things, ordered and adjudged by the said court, in a certain action then pending in the said court, between A.... B.... plaintiff and C.... D.... defendant, that all and singular the mortgaged premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interest and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction by or under the direction of the sheriff of the county of, at any time after one year from the date of said judgment, unless previous to such sale said premises and said judgment shall be redeemed in the manner provided by law; that the said sale be made in the county of, where the premises are situated; that the said sheriff give public notice of the time and place of such sale, in the manner provided by law; that either or any of the parties in said action might purchase at such sale; that the said sheriff, upon compliance by the purchaser with the terms of such sale, execute and deliver to the purchaser or purchasers a deed of the premises so sold, setting forth each tract or parcel so sold, and the sum paid therefor;

And whereas, neither said premises, nor any part thereof, had been redeemed, and neither said judgment, nor any part thereof had been paid, and one year from the date of said judgment had expired;

And whereas, the said sheriff, in pursuance of the said judgment of the said court, did on the day of, 19.., sell at public auction, at the [name place] at the hour of o'clock .. M. of that day, the premises in said judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said judgment, at which sale the premises hereinafter described were struck off to the said party of the second part for the sum of dollars, he being the highest and best bidder therefor, and that being the highest sum bid for the same.

Now, therefore, know ye, that I, the said L.... M...., sheriff aforesaid, by virtue of the said judgment, and of the statute in such case made and provided, and in consideration of the said sum of money, so bidden as aforesaid, being first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened and conveyed, and by these presents do grant, bargain, sell, alien and convey unto the said L.... M.... and to his heirs and assigns forever, all the [describe premises].

To have and to hold, all and singular the premises above mentioned and described, and hereby conveyed, or intended so to be, unto the said party of the second part, his heirs and assigns, to his and their only proper use, benefit and behoof, forever.

In witness whereof, the said L.... M...., sheriff as aforesaid, hath hereunto set his hand and seal the day and year first above written.

L.... M.... [Seal.]
Sheriff Co., Wis.

Signed, sealed and delivered in
presence of: [two witnesses].
[Venue.]

On the day of, 19.., before me came L.... M.... known to be the individual and officer described in, and who executed the above conveyance, and acknowledged that he executed the same as such sheriff, for the uses and purposes therein set forth.

[SEAL] R.... S....,
Notary Public,
..... Co., Wis.

2075. Foreclosure judgment (Minn. Rev. Laws 1905 sec. 4488).

[Title.] [Caption as in Form 7.]

[Recitals substantially as in Forms 2066, 2067 or 2070 depending on the fact whether there has been a default and a reference or whether the proofs have been taken in court or whether an

issue has been made by answer and the same has been tried by the court and continuing] :

Now, on motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED AND DECREED, that there is due said plaintiff from defendant C.... D.... for principal and interest upon the note described in the complaint herein, the sum of dollars and the further sum of dollars for attorney's fees and the sum of dollars, costs and disbursements of this action.

And it is further adjudged and decreed, that the mortgaged premises hereinafter described, or so much thereof as may be sufficient to satisfy the amount due to the plaintiff as aforesaid, with costs of this action, which may be sold separately without material injury to the parties interested, be sold in one parcel at public auction, within the county of where said premises are situated, by the sheriff of county, according to the provisions of law relating to sales of real estate on execution. That the said sheriff give public notice of the time and place of such sale, according to law. That either or any of the parties to this action may purchase said mortgaged premises at said sale. That the said sheriff execute and deliver to the purchaser or purchasers at such sale, the usual certificate as provided by law. That out of the proceeds of said sale, after deducting the amount of his fees and disbursements on said sale, the said sheriff pay to the plaintiff's attorney the sum of dollars, the attorney's fees aforesaid, and the further sum of dollars, costs and disbursements aforesaid, with interest on said sums from date hereof. And also the amount adjudged to be due plaintiff upon said note and mortgage as aforesaid, with interest thereon from date hereof or so much thereof as the purchase money of said mortgaged premises will pay of the same. That he bring the surplus moneys arising from said sale after said payments as aforesaid, if any there be, into court to abide the further order of the court in the premises, and that he make report of said sale and all his proceedings in the premises, and file it with the clerk of this court, with all convenient speed.

And it is further ordered, adjudged and decreed, that the defendant and all persons claiming under them, or either of them, subsequent to the filing of said notice of the pendency of this action, be forever barred and foreclosed of all right, title and equity of redemption, in and to said mortgaged premises so sold and every part thereof [except only the right of redemption, allowed by statute for one year after the date of the order confirming the sale made under and by virtue of this judgment].

And it is further ordered, adjudged and decreed, that if the moneys arising from such sale shall be insufficient to pay said sheriff's fees and disbursements, and the amounts adjudged to be due plaintiff as aforesaid, with interest, then said sheriff shall specify the amount of such deficiency in his report of said sale; and that on the confirmation of said report, the defendant C.... D...., who is personally liable for the payment of the debt secured by said mortgage, pay to the plaintiff the amount of such deficiency, with interest thereon from the date of said report, and that the plaintiff have execution therefor.

The following is a description of the mortgaged premises hereinbefore mentioned [*describe the premises*].

By the Court:

O.... P...., Clerk.

2076. Notice of sheriff's sale in foreclosure (Minnesota).

[*Title.*]

Notice is hereby given that under and by virtue of a judgment and decree entered in the above entitled action on the day of; 19.., a certified transcript of which has been delivered to me, I, the undersigned, sheriff of said county, will sell, at public auction, to the highest bidder, for cash, on the day of, 19.., at o'clock in the noon, at [*name place*] in the city of in said county, in one parcel, the premises and real estate described in said judgment and decree, to-wit [*describe premises*].

Dated, 19..

L.... M....,

Sheriff of County.

E.... F....,

Plaintiff's Attorney.

2077. Sheriff's report of foreclosure sale (Minn. Rev. Laws 1905 sec. 4493).

[*Title.*]

To the Court of the County of

I, L.... M...., sheriff of the county of in said state, do hereby certify and report that in pursuance and by virtue of the judgment and decree of the court in the above entitled action, a certified transcript of which has been delivered to me, with instructions to enforce the same, which transcript is hereto attached, I advertised that the premises and real estate mentioned and described in said decree, would be sold by me at the in the city of in said county, on the day of, 19.., at o'clock in the noon; that previous to

said sale I caused notice thereof to be published once in each week for six successive weeks, in the N.... Z...., a newspaper printed and published in said county of, and by causing such notice to be posted in three public places in said county, for six weeks successively, which notice contained a full description of said premises and the terms of sale as in said decree provided.

And I do further certify and report that at the time and place mentioned in said notice, to-wit: the day of, 19.., at o'clock in the noon at in the city of in said county of I attended and exposed said premises for sale, in parcels at public auction, to the highest bidder, and the said premises were then and there fairly struck off and sold to M.... N.... for the sum of dollars, he being the highest bidder and that being the highest sum bidden therefor.

And I do further certify and report, that I have executed, acknowledged and delivered to said purchaser the usual sheriff's certificate of sale for said premises.

Of the proceeds of said sale: first, I have retained the sum of dollars, my fees and the expenses of said sale; second, I have paid to the plaintiff's attorney the sum of dollars, the attorney's fees mentioned in said decree; third, I have paid the plaintiff's attorney the sum of dollars, the costs and disbursements of this action, and interest; fourth, I have paid said plaintiff A.... B.... the sum of dollars, the amount adjudged plaintiff in said decree, and have taken receipts for said sums, which receipts are attached hereto and made part hereof [*attach receipts*].

And I do further certify and report, that the premises so sold by me as aforesaid were described in said judgment, notice of sale, and certificate, as follows [*describe premises*].

All of which is respectfully submitted.

Dated, 19..

L.... M....,
Sheriff of County.

[*Venue.*]

L.... M.... being duly sworn says that he is the sheriff of said county of and state of Minnesota; that he has read the foregoing report and knows the contents thereof, and that the same is true of his own knowledge.

L.... M....

[*Jurat.*]

[*The order of confirmation may be substantially as in Form 2073.*]

2078. Sheriff's certificate of sale on foreclosure by action
(Minn. Rev. Laws 1905 sec. 4487).

[*Venue.*]

I, L.... M...., sheriff of the county of, state of Minnesota, do hereby certify that under and in pursuance of a certain judgment and decree, entered in the district court of the county of, ... judicial district, state of Minnesota, on the day of, 19.., in a certain action pending in said court, wherein A.... B.... was plaintiff and C.... D.... was defendant, in favor of said plaintiff and against said defendant, wherein it was among other things adjudged and decreed that a certain mortgage, made and executed by C.... D.... aforesaid to A.... B.... bearing date the day of, 19.., and recorded in the office of the register of deeds in and for the county of, state of Minnesota, on the day of, 19.., in Book of Mortgages, at page be foreclosed, and that the premises described in said mortgage, being the same premises hereinafter described, should be sold by the sheriff of said county to satisfy the amount found due the said plaintiff, with costs and disbursements, a duly certified transcript of which judgment and decree having been delivered to me with instructions to enforce the same, and having first given due notice of sale, as required by said judgment and decree, and in accordance with the statute in such case made and provided, I did, on the day of, 19.., at o'clock in the noon, at [*name place*] in the of in said county of duly offer for sale, at public auction, to the highest bidder for cash, the premises hereinafter described, in one parcel, and did then and there strike off and sell to M.... N.... for the sum of dollars, he being the highest bidder, and that being the highest sum paid for the same, the following described premises, to-wit [*describe premises*], with all the hereditaments and appurtenances thereto belonging or in anywise appertaining.

And I do further certify, that one year from the date of the order confirming said sale is allowed by law for the redemption of said premises from said sale.

In witness whereof, I have hereunto set my hand and affixed my seal this day of, 19..

L.... M.... [Seal.]

Sheriff of County, Minn.

Signed, sealed and delivered in
presence of [*two witnesses*].

[*Venue.*]

On this day of, 19.., before me, personally appeared L.... M.... to me known to be the same person who

executed the foregoing instrument, and to be the sheriff of the county of in the state of Minnesota, and acknowledged the execution of said instrument to be the free act and deed of said sheriff.

X.... Y....,
Notary Public, ... County, Minn.

2079. Notice of redemption, to sheriff, by redemptioner (Minnesota, North Dakota and South Dakota).

To the Sheriff of County, State of, and to all whom it may concern:

NOTICE is hereby given, that the undersigned intends to redeem and does hereby redeem the following described land and premises, situated in the county of and state of, viz: [*describe premises*] from the sale thereof, made by the sheriff of said county, on the day of, 19.., upon the foreclosure of the certain mortgage upon said land and premises, dated on the day of, 19.., made and executed by C.... D.... to A.... B.... and recorded in the office of the register of deeds of said county of on the day of, 19.., in Book of Mortgages, at page, at which sale said land and premises were sold to one M.... N.... for the sum of dollars, and the certificate of which sale was recorded on the day of, 19.., in said register's office, in Book of at page

The undersigned will make such redemption as owner of said premises [*or, as a creditor having a lien upon said land and premises, which lien consists of, describing lien*].

Witness the hand and seal of the undersigned, this day of, 19..

C.... D.... [Seal.]

In presence of [*two witnesses.*]
[*Venue.*]

On this day of, 19.., before me, a notary public within and for said county, personally appeared C.... D.... to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

X.... Y....,
Notary Public, ... County.

2080. Sheriff's certificate of redemption on foreclosure (Minn. Rev. Laws 1905 sec. 4487).

KNOW ALL MEN by these presents, that I, L.... M.... as sheriff of the county of in the state of Minnesota, do

hereby certify that M.... N.... of in the state of has this day paid to me as such sheriff the sum of dollars, [\$....] in redemption of the following described lands and premises, situated in the county of and state of Minnesota, viz: [*describe premises*] from the sale thereof made by the sheriff of said county, on the day of, 19.., upon the foreclosure of that certain mortgage upon said land and premises, dated on the day of, 19.., made and executed by C.... D.... and recorded in the office of the register of deeds of said county of on the day of, 19.., in Book of Mortgages, at page, at which sale said land and premises were sold to said M.... N.... for the sum of dollars [\$....], and the certificate of which sale was recorded on the day of, 19.., in said register's office in Book of at page

And I further certify that such redemption was made by said C.... D.... upon the claim that he is the owner of said land and premises above described [*or, is the senior creditor of said C.... D.... and has a legal lien upon said premises subsequent to said mortgage, by virtue of a judgment, describe in what form lien exists*] and that said C.... D.... at the time of making such redemption produced and exhibited to me the papers required by law to evidence the right to make such redemption.

In testimony whereof, I have hereunto set my hand and seal this day of, 19..

L.... M.... [Seal.]

Sheriff of the County of, Minn.

Signed, sealed and delivered in
presence of [*two witnesses*].
[*Venue.*]

On this day of, 19.., before me, personally appeared L.... M.... to me known to be the same person who executed the foregoing instrument, and to be the sheriff of the county of in the state of Minnesota, and he acknowledged the execution of said instrument as the free act and deed of said sheriff.

X.... Y....,

Notary Public, ... County, Minn.

2081. Certificate by owner of certificate of sale, of redemption in foreclosure (Minn. Rev. Laws 1905 sec. 4487).

KNOW ALL MEN by these presents that I, A.... B...., of in the state of do hereby certify that I am the owner of that certain certificate of sheriff's sale hereinafter de-

scribed, and that M.... N.... of in the state of has this day paid to me, etc. [*follow the last preceding form for the remainder of the certificate*].

2082. Judgment of foreclosure and sale (N. Dak. Rev. Codes sec. 5866; S. Dak. Rev. Codes C. P. sec. 656).

[*Title.*]

[*Caption as in Form 7.*]

[*Recite service of process, and default, reference if any or trial by court as in Forms 2066, 2067 or 2070 and continuing*] :

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED, that there is now due to the plaintiff A.... B.... from the said defendant C.... D.... for principal and interest on said note and mortgage, described in the complaint, the sum of dollars, besides the sum of dollars attorney's fees, stipulated in said mortgage, and the costs of this suit, taxed at the sum of dollars, said sums amounting in the aggregate to dollars.

And on like motion, it is further adjudged and decreed that the mortgaged premises hereinafter described, or so much thereof as may be sufficient to raise the amount so found and adjudged to be due to the plaintiff for principal, interest, attorney's fees and costs of suit, taxed as aforesaid, and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold by public auction at the front door of the court house in the of in said county of by or under the direction of the sheriff of said county, upon the like notice and in the same manner as provided by law for the sale of real property upon execution. That the plaintiff or any other party to this action may become the purchaser on such sale. That the said sheriff execute to the purchaser or purchasers a certificate of such sale, and upon the confirmation of the report thereof, and the expiration of the time allowed by law for the redemption of said premises therefrom, if said premises are not then redeemed, that said sheriff, or his successor in office, make to the purchaser or purchasers a deed or deeds of the premises sold. That out of the proceeds of the sale, after deducting the amount of his fees, disbursements and commissions on said sale, the said sheriff pay to the plaintiff or his attorney the said amount so found and adjudged to be due as aforesaid, to-wit: dollars, together with interest thereon at seven per cent. per annum from this date, or so much thereof as the said proceeds of sale will pay of the same, and that he take a receipt of the plaintiff or his attorney for the amount so paid, and file the same with his report of sale. That the said sheriff pay the

surplus moneys arising from such sale, if any, to the clerk of this court, and that he make a report of such sale and his doings in the premises, and file it with the clerk of this court, with all convenient speed; and that the purchaser or purchasers at such sale be let into possession of the premises on production of the sheriff's deed for such premises, or any part thereof. And it is further ordered, adjudged and decreed that if the proceeds of such sale be insufficient to pay the amount so adjudged to be due to the plaintiff, with the interest and costs and expenses as aforesaid, the said sheriff shall specify the amount of such deficiency in his report of sale, and that said defendant C.... D.... pay the same to the plaintiff, with interest from the day of sale and that plaintiff have execution for such deficiency against the property of said defendant C.... D....

And it is further ordered, adjudged and decreed, that the defendants, and all persons claiming under them or either of them, after filing the aforesaid complaint, and after the commencement of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in and to the said mortgaged premises so sold, or any part thereof, unless the same shall be duly redeemed within one year from the day of sale, as provided by law.

The following is a description of the premises to be sold as hereinbefore directed [*describe premises*].

By the Court:

O.... P...., Clerk.

2083. Special execution on foreclosure of mortgage (N. Dak. Rev. Codes sec. 5501; S. Dak. Rev. Codes C. P. 330).

[*Title.*]

The State of to the Sheriff of County,

GREETING: Whereas, on the day of, 19.., a judgment and decree of foreclosure of mortgage was rendered in this action in favor of the above named plaintiff against the above named defendant, which said judgment was docketed in the office of the clerk of the court for county on the day of, 19.., and is in words and figures as follows, to-wit [*insert copy of judgment in full*].

Now, therefore, we command you that you execute said judgment and decree by making sale of said premises herein above described, or so much thereof as may be necessary to satisfy said sums so adjudged to be due to the plaintiff, with interest thereon from the date of said judgment, together with costs and expenses of sale, in accordance with the requirements of said judgment,

and apply the funds realized on said sale in conformity therewith, and make the return of this writ to the clerk of said court.

WITNESS, The Hon. R.... S.... judge of said circuit court
and the seal of said court, and the hand of the clerk

[SEAL] thereof, at in said county of this
.... day of, 19..

O.... P...., Clerk.

2084. Notice of foreclosure sale (North Dakota and South Dakota).

[*Title.*]

NOTICE is hereby given, that by virtue of a judgment of foreclosure and sale in the above entitled action on the day of, 19.., and an execution issued upon said judgment, the subscriber, L.... M...., sheriff of county, state of, for that purpose appointed, will sell at public auction at the front door of the court house in the city of, county of, and state of, on the day of, 19.., at o'clock in the noon of that day, the real estate and mortgaged premises situate in the county of, and state of, and directed in said judgment and execution to be sold, and therein described as follows [*describe premises*] or so much thereof as may be sufficient to satisfy said judgment and costs, amounting in all to dollars and cents, with interest thereon from the date of said judgment, and all accruing costs of sale.

Dated, 19..

L.... M....,
Sheriff of County.

E.... F....,
Plaintiff's Attorney.

2085. Sheriff's certificate of sale (N. Dak. Rev. Codes sec. 5872; S. Dak. Rev. Codes C. P. sec. 662).

[*Venue.*]

I, L.... M...., sheriff of county, state of, do hereby certify that by virtue of a judgment of foreclosure and sale rendered in the court of county, state of, on the day of, 19.., in favor of A.... B.... plaintiff and against C.... D.... and E.... F.... defendants, foreclosing that certain mortgage upon the real estate hereinafter described, executed by said C.... D.... to said E.... F.... to secure payment of the sum of dollars and interest from, 19.., said mortgage being recorded in [*state where and when recorded*], and by virtue of the execu-

tion thereafter issued on said judgment and delivered to me, I did on the day of, 19.., at the hour of o'clock in the noon of said day, having first given public notice of the time and place of sale as required by law, and as directed in said judgment and execution, offer for sale at public auction at the front door of the court house in the said county of the following described mortgaged real estate and premises situated in the county of and state of, to-wit [*describe premises*]. And I then and there openly and publicly struck off and sold the same to W.... X.... for the aggregate sum of dollars in the manner and at the price following, that is to say [*here describe each parcel sold and amount for which it was sold*].

And I further certify that the said purchaser was the highest bidder for said premises and for each tract or parcel included therein, and that the price for which they were sold as aforesaid was the highest price bid for each distinct parcel, and the whole price so bid was paid to me by said purchaser. And I further certify that the said purchaser will be entitled to a deed of the said premises so sold at the expiration of one year from the date of said sale, unless the said premises are previously redeemed as provided by law.

Given under my hand this day of, 19..

L.... M....,

Sheriff of County.

[*Venue.*]

On this day of, 19.., before me personally appeared L.... M.... known to me to be the sheriff [*or, deputy sheriff*] of county and also to be the person described in and who executed the within and foregoing instrument in his said capacity as sheriff aforesaid and acknowledged that he executed the same as such sheriff as his free act and deed.

Witness my hand and official seal.

[SEAL]

Y.... Z....,

Notary Public.

2086. Sheriff's report of foreclosure sale (North Dakota and South Dakota).

[*Title.*]

To the Court:

In pursuance of a judgment of foreclosure and sale made in the above entitled action on the day of, in the year 19.., I, the sheriff of the county of in the state of, do respectfully certify and report that having been charged by the said judgment with the execution thereof, I

caused public notice of the time and place of such sale to be given, by publication thereof once a week, for thirty days immediately preceding such sale in a public newspaper printed and published in said county of to-wit: the N.... Z.... which notices contained a description of the said mortgaged premises, all as in said judgment directed.

And I further report, that on the said day of, 19.., the day on which the said premises were so advertised to be sold as aforesaid, I attended at the time and place fixed for said sale and exposed said premises for sale at public auction, to the highest bidder, and the said premises were then and there struck off and sold to W.... X.... for the sum of dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same.

And I further certify and report, that I have executed, acknowledged and delivered to said purchaser the usual certificate of sale for said premises. And I have retained in my hands the sum of dollars, being the amount of my fees and disbursements on said sale, and have paid to the attorney for the plaintiff the sum of dollars [and have paid to the clerk of this court the surplus moneys arising from such sale, amounting to dollars, and taken his receipt therefor, which is hereto annexed.] [*Or if there was a deficiency state amount thereof.*]

And I further certify and report, that the premises so sold and conveyed as aforesaid were described in said judgment and decree, and in the certificate so executed by me aforesaid, as follows, viz. [*describe premises*].

All of which is respectfully submitted.

Dated, 19..

L.... M....,
Sheriff of County.

2087. Order confirming sheriff's report of sale (North Dakota and South Dakota).

[*Title.*]

[*Caption as in Form 7.*]

On reading and filing the report of L.... M...., sheriff of county, state of, dated, 19.., by which it appears that the several lots and parcels described in said report, have, after due and legal notice, been separately struck off and sold at public auction as follows [*here state parcels sold separately, if so sold, giving names of purchasers and separate amounts bid, and stating aggregate sum of all sales*]. And the court having carefully examined the proceedings of said officer, and being satisfied that the sale has in all respects been made in

conformity to the provisions of the statute in such case made and provided.

Now, on motion of G.... H...., attorney for plaintiff,

IT IS ORDERED and adjudged that the report and the said sale be, and the same are hereby in all things approved and confirmed, and the clerk of this court is ordered and directed to make an entry on the journal of this court that the court is satisfied of the legality of such sale. *

It is further ordered, that said sheriff deliver to said purchaser [*or* purchasers] the usual certificate of sale, and at the expiration of one year from the day of such sale, unless the said premises shall be redeemed from said sale, according to law, that said sheriff or his successor in office as such sheriff, make to the said purchaser or to his heirs, representatives or assigns, a good and sufficient deed of conveyance of the said lands so sold.

By the Court:

J.... K...., Judge.

2088. Sheriff's certificate of redemption (N. Dak. Rev. Codes sec. 5545; S. Dak. Rev. Codes C. P. sec. 380).

Whereas, the following real estate, situated in the county of and state of, to-wit [*describe premises*] with the appurtenances, was, on the day of, 19.., at the [*name place*] in the city of in said county, by virtue of and pursuant to a judgment rendered [*describe judgment*] and the execution issued thereon sold at public auction, to M.... N.... for the sum of dollars, he being the highest bidder and that being the highest sum bid therefor;

And, whereas, C.... D.... has produced to me the proofs required by the statute showing that he was and is entitled to redeem said premises from the effect of said sale by virtue thereof, and has paid to me the sum of dollars, that being the amount for which said premises were legally sold as aforesaid, and the interest thereon at per cent per annum to this date.

Now, therefore, I, L.... M...., sheriff of said county, do hereby certify that the said C.... D.... has this day fully and legally redeemed all and singular the said real estate and appurtenances from the effect and operation of the said sale hereinbefore described, by such payment as aforesaid.

In testimony whereof, I have hereunto set my hand and seal this day of, 19..

L.... M.... [SEAL.]

Signed, sealed and delivered in
presence of [*two witnesses*].

[Venue.]

On this day of, 19.., before me, a notary public in and for said county and state, personally appeared L.... M...., sheriff of the county of and state of known to me to be the person who is described in and who executed the within instrument and acknowledged to me that he executed the same as such sheriff for the uses and purposes therein expressed.

X.... Y....,
Notary Public, ... County.

[SEAL.]

2089. Sheriff's deed on foreclosure by action (North Dakota and South Dakota).

This indenture, made this day of, 19.., between L.... M...., sheriff of county, and state of, party of the first part, and M.... N.... of in said state, party of the second part;

Whereas, at a term of the court in and for the county of in the judicial of the state of, held at the court house in the of in said county on the day of, 19.., it was, among other things, ordered, adjudged and decreed by the said court, in a certain action then pending in the said court, between A.... B.... plaintiff and C.... D.... defendant that all and singular the premises described in a mortgage executed by said C.... D.... to said A.... B.... and recorded in the register of deeds' office of said county, in book of on page and being the same premises mentioned in the complaint in said action, and in said judgment described, or so much thereof as might be sufficient to raise the amount due to the plaintiff for principal, interests and costs in said action, and which might be sold separately without material injury to the parties interested, be sold at public auction at the front door of the court house in the of in said county of where the said mortgaged premises, or the greater part thereof are situated, by or under the direction of the said sheriff of said county, who was appointed for that purpose in said action, and to whom it was referred by the said order and judgment of the said court, among other things to make such sale; that the said sale be made upon the like notice and in the same manner as provided by law for the sale of real property upon execution; and that any of the parties in said action might become a purchaser or purchasers on said sale; that the said sheriff execute to the purchaser or purchasers of the said mortgaged premises, or such part or parts thereof as shall be sold, a certificate of

said sale; and upon the confirmation of the report thereof and the expiration of the time allowed by law for redeeming said premises therefrom, if said premises are not redeemed, that said sheriff, or his successor in office, make to the purchaser or purchasers, a good and sufficient deed or deeds of conveyance of the same.

And whereas, the said sheriff, in pursuance of the order and judgment of the said court, did on the day of, 19..., sell at public auction at [*name place*] the premises in the said order and judgment mentioned, due notice of the time and place of such sale being first given, agreeably to the said order; at which sale the premises hereinafter described were struck off to the said party of the second part for the sum of dollars, that being the highest sum bidden for the same. And whereas, the time for the redemption of said premises having expired and no redemption from such sale having been made, and the said party of the second part being the owner and holder of said certificate of sale;

Now this indenture witnesseth, that the said sheriff, the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of the said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant and convey to the said party of the second part the following described piece or parcel of land, situate in the county of and state of, to-wit [*describe premises*] together with all the appurtenances and improvements thereto belonging or in anywise appertaining.

To have and to hold, all and singular the premises above mentioned and described and hereby conveyed, unto the said party of the second part, his heirs and assigns forever.

IN WITNESS whereof, the said party of the first part, sheriff as aforesaid, hath hereunto set his hand and seal the day and year first written.

L.... M.... [SEAL.]

Signed, sealed and delivered in .
presence of [*two witnesses*].
[*Venue*.]

On this day of, 19..., before me a notary public in and for said county and state, personally appeared L....

M...., sheriff of county, known to me to be the person and officer who is described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

[SEAL.]

X.... Y....,
Notary Public,
..... County.

2090. Judgment of foreclosure and sale (Cobbey's Ann. Stats. Nebr. sec. 1794).

[Title.]

[Caption as in Form 7.]

[Recitals substantially as in Forms 2066, 2067 or 2070 as may be appropriate to the facts of the case, and continuing];

Now on motion of G.... H.... plaintiff's attorney it is, FOUND AND ADJUDGED that the defendant C.... D.... on the day of, 19.., executed and delivered to the plaintiff his mortgage deed upon the real estate hereinafter described as alleged in the petition herein, and that the same was duly recorded on the day of, 19.., on the record of mortgages of county and that there is due to the plaintiff upon the notes set forth in said petition, which said mortgage was given to secure, the sum of dollars, and that the plaintiff is entitled to a foreclosure of said mortgage as prayed. *

And it is further adjudged that in case the defendants fail, for days from the entry of this decree, to pay to the plaintiff the sum of dollars, with costs amounting in all to the sum of dollars, defendants' equity of redemption in the mortgaged premises be foreclosed, and said mortgaged premises be sold, and an order of sale shall be issued to the sheriff of county, commanding him to sell the above described real estate as upon execution, and bring the proceeds thereof into court, to be applied in satisfaction of the sum of dollars so found due, and costs, upon the confirmation of said sale.

[The said mortgaged premises are particularly described as follows: *insert description.*]

By the Court:

O.... P...., Clerk.

2091. The same, where a subsequent mortgagee is made defendant and his rights are determined (Nebraska).

[Title.]

[Caption as in Form 7.]

[Proceed as in last form to the *, and continuing]:

The court further finds and adjudges that the defendant C.... D.... executed and delivered to the defendant G....

H.... the mortgage deed upon said premises set forth in the cross-petition of said G.... H.... as in said cross-petition alleged, and that the same was duly recorded in the record of mortgages of said county on the day of, 19.., and that the same is a lien upon said premises, second and subject to the plaintiff's said lien thereon, and that there is due thereon to said defendant G.... H.... the sum of dollars.

And it is further adjudged that in case the defendant C.... D.... fail for days from this date to pay the plaintiff the sum of dollars, and also to pay the defendant G.... H.... the said sum of dollars, the defendant's equity of redemption in the mortgaged premises be foreclosed and said mortgaged premises be sold, etc. [*conclude as in last preceding form*].

2092. The same, where part only of the debt is due and the premises can be sold in parcels (Nebraska).

[*Proceed as in Form 2090 stating however the amount actually due and the amounts to grow due separately, and continuing after the **]: The court further finds and adjudges that said premises can be sold in parcels without injury to the interests of any of the parties,

And it is further adjudged that in case the defendant fail for days from the date hereof to pay to the plaintiff the sum of dollars the defendant's equity of redemption in said mortgaged premises be foreclosed, and said premises be sold in such parcels as may be necessary and an order of sale be issued to the sheriff, etc. [*conclude as in said Form 2090*].

2093. The same, where the whole property is to be sold together (Nebraska).

[*Proceed as in Form 2090 stating however the amounts due and to grow due separately, and continuing after the **]: The court further finds and adjudges that said premises cannot be sold in parcels without injury to the interests of the parties, and that a sale of the whole of said premises will be most beneficial to them.

And it is further adjudged that in case the defendant fail for twenty days from the entry of this decree to pay the plaintiff the sum of dollars, the defendants' equity of redemption in said mortgaged premises be foreclosed, and said premises be sold, and that an order issue to the sheriff of county, commanding him to sell the above described real estate as upon execution, and bring the proceeds thereof into the court, to be applied in payment of said amount now due upon the confirma-

tion of said sale. And that the residue of the sum received for said sale be put out at interest for the benefit of the plaintiff, and to be paid to him as the installments or portions of the principal or interest of said mortgage debt may become due, provided that, if the defendant [C.... D....] consent thereto, the whole of said debt, less the rebate of legal interest, may be paid to said plaintiff upon the confirmation of said sale.

[Conclude with description of the premises as in Form 2090.]

2094. Return of foreclosure sale and order of confirmation (Nebraska).

*[The return of the sheriff may be substantially as in Form 2086 and the order of confirmation may be substantially as in Form 2087 to the *, and continuing]:*

And it is further ordered that the said sheriff deliver to the said purchaser, his heirs, representatives or assigns a good and sufficient deed of conveyance of the lands and tenements so sold.

By the Court:

O.... P...., Judge.

2095. Judgment of foreclosure and sale (Iowa Code sec. 4289).

[Title.]

[Caption as in Form 7.]

[Recitals of service of process, default, or trial substantially as in Forms 2066, 2067 or 2070 as may be appropriate, and continuing]: Now upon motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED and decreed that the note and mortgage described in the petition was duly executed and recorded as therein alleged and that there is now due and unpaid thereon dollars, besides the sum of dollars for necessary abstracts of title [and dollars for taxes paid by the plaintiff upon the premises since the execution of said mortgage].

And it is further adjudged that the said plaintiff have and recover judgment against the defendant C.... D.... for the sum of dollars and costs taxed as dollars, including attorney's fees amounting in the aggregate to dollars, and that the same, with interest at per cent. from this date, be and is hereby declared to be a lien upon the mortgaged premises hereinafter described, from the date of said mortgage until paid.

And it is further ordered, adjudged and decreed, that a special execution issue in this action as provided by law, and that said property, or so much thereof as is necessary, be sold under said execution to satisfy the amount due as aforesaid, with interest and costs, and that, at the election of plaintiff, the clerk

of this court is authorized to insert in said special execution a clause requiring the sheriff to seize any property of the defendant, not exempt from execution, to satisfy any prospective balance on said judgment after exhausting the mortgaged premises, or that after the return of said special execution, a general execution, if the plaintiffs so elect, shall issue to make any amount then remaining unpaid. And on and after the day of sale the defendants, and each and all of them, and all persons claiming by, through or under them, are forever barred and foreclosed of all interests and equity in and to said mortgaged premises, except such rights of redemption as are especially provided by law, and that if said real estate be sold and not redeemed, as provided by law, a writ of possession issue to the sheriff of this county, commanding him to put the purchaser at said sale in possession of said premises.

The said mortgaged premises are particularly described as follows [*insert description*].

By the Court:

O.... P...., Clerk.

2096. Affidavit for taxation of stipulated attorney's fees (Iowa Code secs. 3870, 3871).

[*Title.*]

[*Venue.*]

G.... H.... being duly sworn says he is the attorney for the plaintiff in this action; that there has been and is no agreement, express or implied, between this affiant and his client, or between this affiant and any other person, except J.... K...., who is a practicing attorney engaged with this affiant as attorney in this cause, for any division or sharing of the fee to be taxed herein; that this affiant is a regular attorney, and the fee to be taxed herein is in compensation for services actually rendered in this cause. That this action is not aided by attachment, that the defendant C.... D.... [*naming defendant personally liable*] is a resident of said county of and that on or about the day of, 19.., affiant personally notified said C.... D.... that said note and mortgage was in his possession for collection at and has personally demanded payment thereof of said C.... D.... on several occasions since said date and before the commencement of this action [*or otherwise state the opportunity given defendant to pay before suit according to the fact*].

G.... H....

[*Jurat.*]

[*This affidavit must be filed with the petition.*]

2097. Special execution in foreclosure (Iowa Code sec. 4289).
The State of Iowa

To the Sheriff of County:

GREETING: Whereas A.... B.... on the day of, 19.., filed his petition in the court of county, Iowa, against C.... D...., praying for the foreclosure of a certain mortgage upon the premises hereinafter described, and such proceedings were thereafter had in said action that judgment was rendered by said court in said action on the day of, 19.., in favor of said A.... B.... and against said C.... D.... for the sum of dollars damages and dollars costs, including attorney's fees, with interest on said damages, at the rate of per cent. per annum from the date of said judgment, and forever barring and foreclosing the equity of redemption of said defendants in and to said mortgaged premises, and ordering that the same, or so much thereof as shall be necessary, be sold to satisfy said judgment, with the interest and costs aforesaid, and ordering a special execution to issue.

THEREFORE, you are commanded that of the following described real estate in county, Iowa, viz. [*here describe real estate*] or so much thereof as may be necessary by levy and sale, pursuant to the statute in such case made and provided, you cause to be made the sum of dollars debt, and the sum of dollars costs, including attorney's fees, with interest as aforesaid, and all accruing costs, and of this writ make due return to the court within seventy days hereof.

WITNESS L.... M...., clerk of said court, and the seal of said court affixed at my office in in said county, this day of, 19..

L.... M....,

[SEAL]

Clerk, etc.

2098. Sheriff's certificate of sale (Iowa).

[*This may be substantially as in Form 2078*].

2099. Affidavit on motion to set aside foreclosure sale.*

[*Title.*]

[*Venue.*]

C.... D.... being duly sworn says he is one of the [*or, the attorney for the*] defendants in the above entitled action, which

* A sale will rarely be set aside for inadequacy of price unless it appears not only that, on another sale, a larger sum will certainly be realized but that it will be so substantially larger as to justify the delay and expense of another

sale. If any collusion or artifice has been used to keep away bidders this should be most clearly shown by the affidavits. This affidavit may also be used in opposing a motion to confirm the sale.

is an action for the foreclosure of a mortgage upon real property in said county, described as follows [*describe property*].

That judgment of foreclosure and sale was rendered in said action by this court on the day of, 19.., directing that said premises be sold by and under the direction of the sheriff of said county, and that said sheriff advertised said premises to be sold at public auction to the highest bidder at [*name place*], on the day of, 19.., at o'clock ..M of said day.

That at the time and place so fixed for said sale the said sheriff pretended to sell said premises to one M.... N.... for the sum of dollars, and has made report of such pretended sale to this court.

That the said sale ought not to be confirmed for the following reasons: that the reasonable value of said premises is at least dollars, and that if it be offered for sale again at least that sum will be bid for the same by one L.... M...., whose affidavit is attached hereto; that the reason said L.... M.... did not attend said sale and bid said sum is that [*here state reason at length, especially if it be the result of fraud or artifice on the part of the officer or the purchaser*].

[*If the ground on which the sale is attacked be irregularity or fraud of any other nature, the same should be set forth fully and supported by corroborating affidavits if possible.*]

C.... D....

[*Jurat.*]

2100. Order setting aside sale and ordering resale.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the defendant C.... D.... coming on to be heard on the day of, 19.., upon the affidavits of C.... D.... and N.... O.... and the report of said sale on file, for an order setting aside the sale of the premises described in the judgment herein and ordering a resale, and the court having heard G.... H.... for the motion and E.... F.... in opposition thereto; and it appearing that [*state facts showing that sale should be set aside*].

On motion of G.... H...., attorney for the defendant,

IT IS ORDERED: That the sale of the mortgaged premises heretofore made under the judgment in this action be and the same hereby is vacated and set aside, and that a resale of said premises be made by the sheriff of county upon giving the notice required by law and the practice of this court upon the condition [*here state conditions, e. g.*] that the defendant C.... D.... pay to M.... N...., the purchaser, upon demand,

his costs and expenses attending said purchase, which are hereby taxed and allowed at dollars, together with dollars the costs of this motion.

That the said sheriff hold the purchase money received upon said sale until the further order of the court.

By the Court:

R.... S...., Judge.

2101. Bond given as a condition of resale in foreclosure.

[*Title.*]

KNOW ALL MEN by these presents, that we, C.... D.... and M.... N...., of, are held and firmly bound unto A.... B...., of, in the sum of dollars, lawful money of the United States of America, to be paid to the said obligee, his executors, administrators, and assigns, for which payment well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals; dated the day of, 19..

Whereas, at a term of the court, of the state of, held at, in the city of, on the day of, 19.., an order was duly entered in the above-entitled cause, setting aside the sale of the premises heretofore had under the judgment in said cause, and described in the complaint in this action; and ordering a resale of the same, upon the defendant filing a bond with sureties, to be approved by a judge, that at least the sum of dollars, and the expenses of a resale, shall be bid by a *bona fide* bidder at said resale.

NOW THE CONDITION of this obligation is such, that if, on said resale, there shall be a *bona fide* bid of dollars, and in addition thereto of a sum sufficient to pay the expense of said resale, and such bidder shall then and there, if the property is struck down to him, complete his bid as required by the terms of said resale, then this obligation to be void; otherwise to be and remain in full force and virtue.

In presence of C.... D.... [Seal.]
[two witnesses.] M.... N.... [Seal.]

[*Add justification.*]

2102. Affidavit on motion to compel purchaser to complete his purchase.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says: that he is one of the plaintiff's attorneys in this action; that the action was instituted

for the foreclosure of a mortgage, and the mortgaged premises were offered for sale, under the direction of the sheriff of county on the day of, 19.., under the usual terms of sale, and purchased by M.... N....; that by the terms of sale the deed was to be delivered to the purchaser, and the purchase-money was to be paid to the said sheriff on the day of, 19.. That said purchaser declines to complete his purchase, alleging that the proceedings in foreclosure are irregular and void in this, viz. [*here indicate the objections made,—e. g., thus*]: that the summons is not correctly published, and that the defendants W.... X.... and Y.... Z...., who are proceeded against by advertisement, are not foreclosed thereby. Deponent further states that a copy of said summons, as advertised, is hereto annexed.

E.... F....

[*Jurat.*]

2103. Order compelling purchaser to complete his purchase.

[*Title.*]

[*Caption as in Form 7.*]

On reading and filing the affidavit of E.... F.... and the report of sale herein made by L.... M...., sheriff of county, and after hearing E.... F.... for the motion, and G.... H.... [*or, and on proof of service of due notice of this motion, and no one appearing*] in opposition:

ORDERED, that said motion be and the same hereby is * granted, and said M.... N.... is hereby required within days from service of a copy of this order on him to pay to the said sheriff the sum of dollars, being the sum bid by him on said sale [*or otherwise specify how purchase shall be completed*].

2104. Affidavit of purchaser seeking to be discharged from his purchase.

[*Title.*]

[*Venie.*]

M.... N.... being duly sworn says that at the sale of the mortgaged premises pursuant to the judgment in this action by the sheriff of county, held at on the day of, 19.., the said premises were struck off and sold to him for the sum of dollars, and that he thereupon complied with the terms of said sale by paying over to the said sheriff the sum of dollars, the purchase money aforesaid.

That he then employed O.... P...., an attorney and counselor of this court, to examine the title to said property, and that he has been advised by his said attorney, after examining

said title, that the sheriff's deed upon such sale will not pass a good title free from reasonable doubt for the reasons fully set forth in the written opinion of said attorney which is attached hereto marked Exhibit A, and that the facts stated in said opinion are true as the affiant is informed and believes; and that [*here state facts establishing fraud or defective proceedings*].

That on the day of, 19.., he caused a copy of said opinion to be served on said sheriff and a demand that the money paid by him be refunded.

WHEREFORE this affiant prays that he be discharged from said purchase for the reasons aforesaid, and repaid the moneys paid to the sheriff, together with his costs and expenses of attending said sale and examining said title, and that he have such other order as may be proper in the premises.

M.... N....

[*Jurat.*]

2105. Order discharging purchaser and ordering resale.

[*Title.*]

[*Caption as in Form 7.*]

The motion of M.... N...., to be discharged from his obligations as a purchaser of the mortgaged premises in this action, and that the moneys paid by him upon his said purchase be repaid to him, coming on this day to be heard, after hearing O.... P...., Esq., for said motion and E.... F...., Esq., in opposition thereto;

It appearing that [*here state facts showing sale defective or fraudulent*];

IT IS ORDERED that said M.... N.... be and he is hereby discharged from his said purchase and that L.... M...., the sheriff of county, within days repay to said M.... N.... the sum paid by him on such purchase, to-wit, the sum of dollars with dollars, the costs of this motion as taxed [*or provide that plaintiff pay the costs of motion*].

Further ordered that a resale of said premises be made by said sheriff upon notice of sale as provided by said judgment and required by law.

By the Court:

R.... S...., Judge.

CHAPTER CXLVI.

PROCEEDINGS UPON DEFAULT IN ACTION FOR PARTITION.

- | | |
|--|--|
| 2106. Affidavit of no answer; personal service on all defendants, no infants or absentees. | 2118. Final report of commissioners in partition (Wisconsin). |
| 2107. Affidavit of no answer, infant and absent defendants. | 2119. The same, where there are unknown owners. |
| 2108. Notice of application for judgment to be given to any defendant who has appeared. | 2120. The same, where compensation must be made to secure equality of partition (Wisconsin). |
| 2109. Order of reference to take proof of title (Wisconsin). | 2121. Notice of motion to confirm report of actual partition (Wisconsin). |
| 2110. Report of referee appointed by last preceding order (Wisconsin). | 2122. Order confirming report of partition and directing judgment (Wisconsin). |
| 2111. Order determining rights of parties (Wisconsin). | 2123. Final judgment of actual partition (Wisconsin). |
| 2112. Report of referee appointed under last order (Wisconsin). | 2124. Order for sale of the premises where partition can not be made (Wisconsin). |
| 2113. Order for partition and appointing commissioners (Wisconsin). | 2125. Notice of sale in partition. |
| 2114. The same, directing commissioners to plat the premises (Wisconsin). | 2126. Report of sale in partition. |
| 2115. Oath of commissioners in partition (Wisconsin). | 2127. Final judgment in partition after sale of premises. |
| 2116. Preliminary report of commissioners in partition showing platting of the premises. | 2128. Report of sheriff or referee of his proceedings under judgment. |
| 2117. Order approving plat and directing recording of same (Wisconsin). | 2129. Order confirming last report. |
| | 2130. Order appointing commissioners to partition water power (Wisconsin). |
| | 2131. Report of commissioners to partition water power (Wisconsin). |
| | 2132. Judgment for partition of water power (Wisconsin). |

The forms in this chapter are specially adapted for use in Wisconsin, and hence can not be used without change in the other code states. The general features of the partition statutes in the various states are, however, quite similar and these forms can, it is believed, be readily adapted for use in the other

states. See Minn. Rev. Laws 1905 Chap. 82; Iowa Code Title 21 Chap. 6; N. Dak. Rev. Codes secs. 5795-5843; S. Dak. Rev. Codes C. P. Chap. 27; Cobbey's Ann. Stats. of Nebr. secs. 1750-1792.

2106. Affidavit of no answer; personal service on all defendants, no infants or absentees.

[*Title.*]

[*Venue.*]

G.... H...., being duly sworn, says that he is the attorney of the plaintiff in the above entitled action, and that the summons and complaint herein were duly and personally served on each and all of the defendants in this action, on the day of, 19.., as appears by the return of the sheriff of county indorsed upon said summons and that no answer nor demurrer herein has been served on, or received by the affiant, by or from any of the defendants herein; and that none of the defendants have appeared in this action, except the defendant, L.... M....; and none of said defendants are infants or absentees.

G.... H....

[*Jurat.*]

2107. Affidavit of no answer, infant and absent defendants.

[*Title.*]

[*Venue.*]

G.... H.... being duly sworn says that he is the attorney for the plaintiff in this action and that [*continue substantially as in Form 2059 in case of foreclosure, varying the same to accord with the facts.*]

[*Attach affidavits of publication and mailing or of personal service outside of the state using Forms 159 and 160 or 161.*]

2108. Notice of application for judgment to be given to any defendant who has appeared.

[*Title.*]

SIR: Please take notice that the plaintiff will apply to the court, at a term thereof, to be held in the court house, in the city of, in said county, on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, for the relief demanded in the complaint in this action.

G.... H....

[*Date.*]

[*Address to defendant's attorney.*]

2109. Order of reference to take proof of title (Wis. Stats. 1898 sec. 3108).¹

[*Title.*] [*Caption as in Form 7.*]

On reading and filing due proof by the affidavit of G.... H.... that the summons [and complaint] herein has been duly personally served within this state on all the defendants [except the unknown owners and the defendant L.... M...., a non-resident, on each of whom it has been duly served by publication], and that none of the defendants are infants [except the defendant W.... X....], and that none of them have demurred, or put in any answer controverting any material allegation of the complaint, now, on motion of G.... H.... for the plaintiff, and on proof of due notice of this motion to the defendants who have appeared, and after hearing J.... K.... [or, no one appearing] in opposition it is,

ORDERED that it be referred to R.... F...., Esq., an attorney of this court, to take proof of the plaintiff's title and interest in the premises described in the complaint, and of the several matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties in the premises, and to return with his report an abstract of the conveyances by which the same are held, and that he report the same to the court with all convenient speed.

By the Court:

O....P....,

Circuit Judge.

2110. Report of referee appointed by last preceding order (Wisconsin).

[*Title.*]

To the Court for County.

Pursuant to an order of reference in this action dated, 19.., referring it to the undersigned to take proofs of the plaintiff's title and interest in the premises described in the complaint in this action, and of the several matters set forth in the complaint, and to ascertain and report the rights and interests of the several parties in the premises, and to return with my report an abstract of the conveyances by which the same are held, I respectfully report:

That first having taken the oath as referee which is returned herewith I was attended by the attorneys for the several parties who have appeared herein, and proceeded to the hearing of the matters so referred, and having taken proof thereof

¹ The proofs may also be taken in open court without reference. Wis. Stats. 1898 sec. 3108.

I FIND AND REPORT that the rights of the several parties in and to the said premises are as follows, to-wit:

That the plaintiff is the owner, in fee, of an undivided one-third (1-3) part of the same.

That the defendants, C.... D...., and E.... F...., his wife, are as husband and wife, the owners in entirety in fee of an undivided one-third (1-3) part of the premises.

That the defendant, J.... K...., is the owner of, and has an estate in the said premises, for and during his natural life, in an undivided one-third (1-3) part thereof.

That the defendant, Y.... Z...., is the owner of the remainder in fee, upon the termination of the life estate of J.... K...., as above stated [*or otherwise describe particularly the interests of the parties according to the fact*].

That the defendant, L.... M...., has a lien, by way of mortgage upon the share and interest of said defendant, J.... K....

That, hereto annexed, marked exhibit "A," are the proofs taken by me, and exhibit "B," hereto annexed is an abstract of the conveyances by which the said estates and interests are held.

All of which is respectfully submitted,

[Date.]

R.... F....,

Referee.

[*Attach oath of referee as in Forms 1948-1952.*]

2111. Order determining rights of parties (Wis. Stats. 1898 secs. 3108 and 3110).

[Title.]

[Caption as in Form 7.]

This action having come on to be heard at said term and due proof having been made of due service of the summons and complaint herein upon each and all of the defendants and that the time for answering said complaint has expired and that all of said defendants are in default [and that due notice of application for judgment herein has been served upon all defendants who have appeared] and the court having heard the proofs of the parties in open court;

[*Or in case a reference has been had*]: This action coming on to be heard at said term, on the report of R.... F...., referee appointed herein, by order dated, 19.., which report is hereby confirmed, and it satisfactorily appearing therefrom and from the proofs submitted therewith, that the rights, titles and interests of the parties are as therein and hereinafter set forth;

Now on motion of G.... H...., plaintiff's attorney,

IT IS ORDERED AND DETERMINED, That the plaintiff, A.... B...., is the owner, in fee simple, of an undivided one-third part of the premises described in the complaint.

That the defendants, C.... D.... and E.... F...., are the owners of [*here continue, declaring the right, title and interest of each party, plaintiff and defendants in the referee's report*].

It is further ordered, that it be referred to Y.... Z...., Esq., of, to inquire into the situation of the premises described in the complaint, and to report whether the same or any part thereof are so circumstanced that a partition thereof among the owners in interest can not be made without great prejudice to the owners, and also to inquire and report whether the interest of the parties will be promoted by platting the property or any part thereof, and that he make report thereof with all convenient speed.

By the Court:

O.... P...., Judge.

2112. Report of referee appointed under last order (Wis. Stats. 1898 sec. 3110).

[*Title.*]

To the Court of County.

Pursuant to an order of reference dated, 19.., referring it to the undersigned to [*here state matters in conformity with the order and in the manner indicated in Form 2110*];

I HEREBY REPORT that having taken the oath required by law and returned herewith, and having been attended by the attorneys of the several parties appearing herein, I inquired into the situation of the premises described in the complaint and took proofs thereof, which proofs are made part of this report marked Exhibit A.

And I find and report that the said premises are so circumstanced that, in my opinion, a partition thereof can [*or, cannot*] be made without material injury and prejudice to the owners thereof, for the following reasons [*Here set forth the facts and reasons why such partition can or cannot be made.*]

I further report that in my opinion the said premises can not be platted, and that the interest of the parties will [*or, will not*] be promoted by platting the same, for the following reasons, to-wit [*here specify reasons*].

All of which is respectfully submitted,

[*Date.*]

Y.... Z....,

Referee.

[*Attach oath and testimony taken.*]

2113. Order for partition and appointing commissioners (Wis. Stats. 1898 secs. 3111, 3114 and 3141).

[Title.]

[Caption as in Form 7.]

This action coming on to be heard upon the report of Y.... Z...., the referee appointed herein, on the day of, 19..,

And the said referee having made and filed his report, by which it appears that the said premises described in the complaint are so circumstanced that partition thereof can be made without prejudice or injury to said parties, and that the interest of the parties will not be promoted by platting the property.

On reading said report and after hearing the parties who have appeared herein, and on motion of G.... H...., attorney for the plaintiff,

IT IS ORDERED:

I. That said report be and the same is hereby in all respects confirmed, and that partition of said premises be made among the parties hereto according to their respective rights and interests as heretofore determined in this action.

II. That J.... K...., L.... M.... and O.... P...., three disinterested freeholders of the county of, be, and they are hereby, appointed commissioners, for the purpose of making such partition; and the said commissioners, before proceeding to the execution of their duties as such, shall severally be sworn honestly and impartially to make partition as directed by this court; which oaths shall be filed with the clerk of this court, at or before the coming in of the report of the said commissioners, and that the said commissioners shall meet together in the performance of their duties and shall divide the said lands and premises into equal parts, quantity and quality relatively considered, and that they allot to the plaintiff one of the said equal parts of the said premises, and to each of the defendants, C.... D...., E.... F.... and W.... X...., one of the said equal parts of the said premises [*or otherwise specify the shares according to the interests of the parties as determined*] to be held and enjoyed by the said parties in severalty, according to their rights and interests therein as aforesaid. [*Where several shares are to be set off in common, say,* and that they allot to the defendants, C.... D.... and E.... F...., two of the said equal parts of said premises, to be held and enjoyed by them as tenants in common, without partition or apportionment as between themselves, and that the said commissioners shall designate the several shares or portions so allotted, and the boundaries thereof, by posts, stones or other

permanent monuments, and that they make a full report in writing to this court, specifying the manner of executing their trust and describing the lands divided and the shares allotted to each party, with convenient certainty, and the items of their charges, and that such report be filed in the office of the clerk of this court.]

III. That the said commissioners be authorized to employ a surveyor and assistants if necessary and to cause all necessary maps and surveys to be made, and all the parties in this action shall produce to, and leave with, the said commissioners, for such time as the commissioners shall deem reasonable, all deeds, writings, surveys, or maps relating to the said premises, or any part thereof.

IV. That in case partition of such premises can not be made equal between the parties, without prejudice to the rights and interests of some of them, that then and in that case the said commissioners ascertain and report the proper compensation which ought to be made by one party to another for equality of partition, but the said commissioners shall not report compensation to be paid by an infant for equality of partition unless it satisfactorily appears to them that he or they have sufficient personal estate to pay the same, and his or their shares of the costs and expenses of this action, and all other liens, on his or their share of the premises, except in case where, from the situation of the property and interest of the parties, it cannot be charged upon the share of an adult.

V. That a certified copy of this order be made and directed to said commissioners, authorizing and directing them to make partition of said premises in the manner above directed, which order shall be their warrant for such partition. The premises of which partition is hereby ordered are described as follows [description].

By the Court:

O.... P...., Judge.

2114. The same, directing commissioners to plat the premises (Wis. Stats. 1898 sec. 3111).

[Proceed as in last preceding form, reciting however that the report of the referee shows that the interests of the parties will be promoted by platting the premises or some definite part thereof, and insert the following clause between subdivisions IV and V]:

V. It is further ordered that the said commissioners shall first make and acknowledge a plat of said premises in the manner provided by law *[or some part of the premises, describing the*

part] laying out streets, roads and alleys therein as they may deem most beneficial to the parties, and shall make a preliminary report of such plat to this court for its approval and shall not proceed to make partition until such plat and preliminary report shall have been duly approved.

2115. Oath of commissioners in partition (Wis. Stats. 1898 sec. 3112).

[*Title.*]

[*Venue.*]

J.... K...., L.... M.... and O.... P...., the commissioners appointed by this court to make partition in this action, by order dated, 19.., being each duly sworn each for himself says that he will faithfully execute the duties imposed upon him by said order according to the best of his knowledge and ability and honestly and impartially make partition herein as directed by the court.

J.... K....,
L.... M....,
O.... P...., } Commissioners.

[*Jurat.*]

2116. Preliminary report of commissioners in partition, showing platting of the premises.

[*Title.*]

To the Court of County.

The undersigned commissioners appointed by this court in this action by order dated, 19.., to make partition of said premises among the several owners thereof, and to make, acknowledge and report a plat of said premises [*or a specified part, describing same*], before proceeding to make such partition, do hereby report that in pursuance of said order, and having severally taken the oath required by law and by said order, which oaths are attached hereto and filed herewith, they have made and acknowledged a plat of said premises so ordered to be platted, and that attached to this report and forming part thereof is a true copy of said plat, which plat they pray may be approved by the court and ordered to be recorded as provided by law.

[*Date.*]

J.... K....,
L.... M....,
O.... P...., } Commissioners.

[*Verification.*]

[*Attach copy of plat made in accordance with provisions of chapter 101 Wis. Stats. 1898.*]

2117. Order approving plat and directing recording of same
(Wis. Stats. 1898 sec. 3111).

[Title.]

[Caption.]

Upon the preliminary report of J.... K...., L.... M.... and O.... P...., the commissioners appointed in this action by order dated, 19.., to make partition of the premises herein showing that they have platted the same in accordance with the terms of said order, and after hearing all parties who have appeared in said action

Now, on motion of G.... H...., plaintiff's attorney, it is

ORDERED that the said plat so made by said commissioners be and the same is hereby in all things approved and that the same be recorded in the office of the register of deeds of county, and that the said commissioners upon the recording of said plat do proceed to further execute the said order and make partition of the premises, and make report to this court with all convenient speed.

By the Court:

N.... O...., Judge.

2118. Final report of commissioners in partition (Wis. Stats. 1898 sec. 3114).

[Title.]

To the Court of County.

In pursuance of an order of this court, made in the above entitled action on the day of, 19.., by which the undersigned were appointed commissioners and directed to make partition of the following described real estate, to-wit [*here describe the land to be divided*], we, the said commissioners, do respectfully report that having duly taken and subscribed the oath required by said order [which oath is attached to this report and filed herewith] we went upon and examined the said premises and caused the same to be surveyed, and have made partition thereof as follows, to-wit: To the plaintiff A.... B.... we have allotted in severalty the following described parcel of said lands, to-wit [*describe the tract*], and designated upon the plat accompanying this report as lot No. 1. To the defendant C.... D.... we have allotted [*proceed with other shares in the same manner as the first*].

We further report that we employed Q.... R...., a competent surveyor, and [*names of assistants*] as assistants, and with their assistance we have designated the respective shares of the parties by permanent monuments as shown in the plat accompanying this report marked exhibit "A."

The items of our expenses and charges, including our fees as commissioners, are as follows:

.... days' service of each commissioner at
 dollars per day \$.
 Cash paid to Q.... R...., surveyor, for days
 spent in surveying, laying out and mapping the
 premises at dollars per day
 Cash paid and assistants necessarily em-
 ployed by said surveyor in making the survey at
 \$.... per day
 Traveling expenses of commissioners

We further report that we all met together in the performance of all our said duties.

[Date.]

J.... K...., }
 L.... M...., } Commissioners.
 O.... P...., }

[Attach oaths and copy of plat.]

2119. The same, where there are unknown owners.

[Proceed as in last form, inserting at the close of the other allotments]: To the owner or owners whose interests are unknown and not yet ascertained, we have allotted the following described parcel of said lands, to-wit [*describe the tract*], and designated upon said plat as lot No. 4.

2120. The same, where compensation must be made to secure equality of partition (Wis. Stats. 1898 sec. 3141).

[Insert in the last preceding report immediately after the allotment of shares]: We further report that in our judgment in order to secure equality of partition between the parties it is necessary that the defendant C.... D.... pay to the plaintiff A.... B.... the sum of dollars as compensation, and that the payment of such sum be provided for in the judgment in this action.

2121. Notice of motion to confirm report of actual partition (Wis. Stats. 1898 sec. 3116).

[Title.]

Please take notice, that on the pleadings and papers on file in this action and the report of the commissioners appointed herein, which report was filed the day of, 19.., I shall move the court, at a term to be held at the court house in the city of, on the day of, 19.., at o'clock ..M., or as soon thereafter as counsel can

be heard, that said report be confirmed, and final judgment rendered thereon, and for such other relief as may be just.

[*Date.*]

G.... H....,
Plaintiff's Attorney.

[*Address.*]

2122. Order confirming report of partition and directing judgment (Wis. Stats. 1898 sec. 3116).

[*Title.*] [*Caption as in Form 7.*]

Upon the pleadings and proceedings on file herein and upon the report of J.... K...., L.... M.... and O.... P...., commissioners appointed to make partition of the premises in this action, by order dated, 19.., which report was duly filed, 19.., it appearing that due notice of the application to confirm said report has been given to all parties who have appeared in this action,

Now, on motion of G.... H...., attorney for plaintiff herein, and after hearing R.... S.... [*or, no one appearing*] in opposition, and the court being fully advised,

ORDERED, that said report be and hereby is confirmed and that final judgment thereon be entered decreeing that the partition reported by said commissioners be firm and effectual forever.

By the Court:
N.... O...., Judge.

2123. Final judgment of actual partition (Wis. Stats. 1898 secs. 3116, 3141 and 3142).

[*Title.*] [*Caption as in Form 7.*]

This action having come on to be heard upon the report of J.... K...., L.... M.... and O.... P...., commissioners appointed herein to make partition of the premises described in the complaint herein, by order of this court dated, 19.., which report was filed, 19.., and by which it appears that the said commissioners have made partition of said premises between the parties, according to their respective rights and interests therein, as the same have been ascertained and determined by this court, and by which said partition the said commissioners have allotted in severalty to the said A.... B.... that certain portion of said land bounded and described as follows [*description*], as will more fully appear by a map of said partition annexed to said report and have allotted in severalty to the said C.... D.... [*proceed with other shares in the same manner*].

Now, on motion of G.... H...., for the plaintiff, and after hearing R.... S.... for the defendant, said report having been duly confirmed and the court having ordered judgment as hereinafter stated:

IT IS ORDERED AND ADJUDGED,

1. That the said report, and all things therein contained, do stand ratified and confirmed, and that the partition so made be firm and effectual forever.

2. That the several parcels hereinbefore described as allotted to said A.... B.... shall be and the same hereby are vested in him, the said A.... B...., in severalty, to be held and enjoyed by him, his heirs and assigns forever, and that he be let into possession immediately [*or if possession is not to be given until after the determination of a particular estate, state when*].

3. [*If compensation is to be made to secure equality*]: And it appearing to the court from said report that the share of C.... D.... is worth more in proportion than the shares of the other parties, and that it is necessary that compensation be made by said C.... D.... to said other parties in order to secure equality of partition, it is adjudged that said C.... D.... make compensation to said [*name the parties*] in order to make said partition equal and that he pay to each of said parties dollars, and that each of said last-named parties have execution for the sum so adjudged against said C.... D...., and that the same be adjudged a lien upon the said share of C.... D.... in said lands.

4. It is further adjudged that the plaintiff recover his costs in this action to be taxed; that the defendant C.... D.... pay to the plaintiff or his attorney one part of said costs and allowances; that the defendant E.... F.... pay [*proceed in the same way with the other defendants*].

By the Court:

N.... O...., Judge.

2124. Order for sale of the premises where partition cannot be made (Wis. Stats. 1898 secs. 3119, et seq.)

[*Commencement and recitals as in Form 2113 substituting however in place of the statement that it appears by the report of the referee that partition of the premises can be made, the following*] by which it appears satisfactorily to the court that partition of said premises described in the complaint cannot be made without great prejudice to the owners and that the interest of the parties will not be promoted by platting the said property;

On reading, etc. [*as in Form 2113*];

IT IS ORDERED, that said report be and the same is hereby in all respects confirmed;

And it is further ordered that all and singular, the premises mentioned in the complaint in this action, and described as follows [*description*], be sold at public auction to the highest bidder at the city of in the county of, by and under the direction of R.... F...., sheriff of said county [*or*, R.... S.... who is hereby appointed referee for the purpose of making such sale]; that the said several lots be sold separately, or in such portions as to the said referee may seem most for the interest of the parties interested therein; that the said referee give notice of the time and place of such sale, in the same manner as is required by law and the rules and practice of this court for sales of real estate upon commission; and the plaintiffs, or any of the parties to this action, may become the purchaser or purchasers thereof. That such sale shall be for cash [*or*, that said sheriff *or* referee, upon such sale may receive not less than one-third of the purchase money of each parcel in cash and may give credit to the purchaser for the balance of the purchase price upon his note or bond secured by mortgage upon the parcel sold, running not exceeding years at per cent. per annum; *or otherwise state terms of sale and credit allowed by the court*].

[*When there is an existing right of dower add*]: And it appearing that the defendant S.... T.... has an existing right of dower in the whole of said premises and the court having determined that under all the circumstances of the case such dower estate ought to be excepted from [*or*, included in] such sale, it is further ordered that upon such sale the said dower estate be excepted therefrom and shall not pass thereby [*or*, be included in and pass by such sale], so that the purchaser thereof, his heirs and assigns, shall have the same discharged from all claims by virtue of such dower estate.

Further ordered, that the said sheriff [*or*, referee] after completing such sales report the same to this court with a description of the parcels sold to each purchaser, the name of such purchaser, the price bid by him, and that he pay into court the proceeds of such sale to abide the order of the court.

By the Court:

J.... K...., Judge.

2125. Notice of sale in partition.

[*Title.*]

By virtue of a judgment of partition and sale, made in the above entitled action on the day of, 19.., the subscriber, sheriff of county [*or*, a referee, for that purpose

duly appointed] will sell, at, in, on the day of, 19.., at o'clock in the noon of that day, the real estate directed by said judgment to be sold, and therein described, as follows [*describe premises, each lot separately*].

[*Date.*]

R.... Z....,

Sheriff aforesaid [*or, Referee*].

G.... H...., Plaintiff's Attorney.

2126. Report of sale in partition.

[*Title.*]

To the Court of County.

Pursuant to the order of sale made in this action on the day of, 19.., I, R.... S...., the sheriff of county [*or, the referee in said order named*], respectfully report:

That I caused notice of the time and place of sale of the premises ordered to be sold, in manner following, to-wit, by causing a notice of said sale and the time and place thereof, and describing the real estate to be sold to be fastened up in three public places in the town of, in which said land was to be sold, and a like notice to be fastened up in three public places in the town of, in said county, in which last named town the said premises are situated for six successive weeks previous to said sale, and by causing a copy of said notice to be printed once in each week, for six successive weeks, previous to said sale in the [*name of newspaper*], a newspaper printed and published in said county, due proof of which publication and posting is attached to and made part of this report.

That on the said day, at the time and place designated in said notice, I attended, and then and there, I offered said premises for sale at public auction to the highest bidder, in manner following, as directed by said order: [*if sale was ordered in parcels.*] The several parcels were put up for sale separately and were each of them fairly struck off as follows:

The [*here describe a separate parcel*] was fairly struck off and sold to A.... B.... for the sum of dollars, he being the highest bidder, and that the highest sum bidden for the same.

The [*here describe another separate parcel*] was fairly struck off and sold to C.... D.... for the sum of dollars, he being the highest bidder, and that the highest sum bidden therefor [*and so on till all parcels are reported*].

I further report that said purchasers have paid on their said respective purchases the sums following, viz.:

A.... B...., the sum of dollars; C.... D....,

the sum of dollars; being one-third of the purchase money on their respective purchases.

That they have also agreed to execute and deposit with me, to be delivered upon due confirmation of sale, bonds and mortgages, as follows [*here describe the securities to be executed*].

That said moneys, less the sum of dollars, which I have retained as the fees, costs and expenses of such sale, I bring herewith into court to abide its order.

All of which is respectfully submitted.

[*Date.*]

R.... S....,
Sheriff.

2127. Final judgment in partition after sale of premises.

[*Title.*]

[*Caption as in Form 7.*]

This being an action of partition and due proof having been made and filed of the service of the summons and complaint herein upon all of the defendants, and of their default and that due notice of the pendency of this action was filed in the office of the register of deeds of county on the day of, 19...; and the rights of the parties in and to the premises described in the complaint having been duly determined by order dated, 19..., and a sale of the premises having been ordered; and the sheriff of county [*or*, R.... S...., the referee appointed by said order] having made sale of said premises and reported the same to this court;

Now upon reading said report, it appearing to the court that said sale was duly made in accordance with said order and was in all respects fair, and on motion of G.... H.../., Esq., plaintiff's attorney,

IT IS ADJUDGED that the said sale and the report thereof be and are hereby in all respects confirmed:

That said sheriff [*or*, referee] do execute and deliver to the purchaser(s) at such sale, respectively, conveyances of the said premises so purchased by them, that is to say, that he execute to S.... T.... a deed of conveyance of the following described premises [*describe same*], and that for the portion of the purchase money for which credit is allowed, as ordered herein, the said sheriff take the bond [*or*, note] of said purchaser executed to and in the name of O.... P...., as clerk of this court, conditioned for the payment of said purchase money for which credit is given, to-wit, the sum of dollars, in [*here state time and installments of payment*], with interest [*payable annually*] at the rate of per cent. per annum, secured by mortgage in the usual form on the premises purchased and above described, and deliver the same to the clerk of this court with a

sufficient sum to pay for the recording of the same. [*Same directions as to other purchasers.*]

It is further adjudged, that this judgment and said conveyances be binding, as provided by law, upon all the parties to this action and their legal representatives, and upon all persons claiming, or to claim, from said parties or persons, or either of them, subsequent to the filing of the notice of the pendency of this action.

And it is further adjudged, that the costs of the parties to this action, to be taxed, to-wit, the sum of dollars and cents, be allowed and paid to the plaintiff.

[*In case of a doweress, whose share is to be invested*]: It is further adjudged, that out of the moneys secured by mortgage, the sum of dollars be set apart and the interest thereon at the rate of per cent. per annum be paid to S.... T.... annually as her dower interest in said premises, and that when said mortgage shall be fully paid, then, if she be still living, that the same be re-invested in permanent securities, by the clerk of this court, at interest, payable annually, so that such interest annually may be paid to her during her life, under the direction of the court.

It is further adjudged that the said sheriff [*or, referee*] retain out of the moneys received by him and deposited in court the sum of dollars in payment of his fees, commissions and expenses of sale.

[*If a creditor is to be paid*]: It is further adjudged, that said sheriff pay to W.... R.... the sum of dollars, with interest thereon from [*state date*] until the day of payment, out of the moneys in his hands, take his receipt therefor, in full satisfaction of the said W.... R....'s mortgage [*or, judgment*] lien on said premises.

[*If a dower right is to be discharged by payment of a gross sum*]: It is further adjudged, that the said sheriff [*or, referee*] pay to the said S.... T...., widow of E.... T...., the sum of dollars, the same being upon the principles applicable to life annuities, a reasonable satisfaction for her interest in said premises [*or, a portion of said premises*] [*or, the share of, name him*] in said premises, she having duly consented to accept such sum, by consent in writing, sealed, witnessed and acknowledged as a conveyance, and duly filed herein.

And it is further adjudged, that said sheriff pay to the plaintiff one equal [one-third] part of the residue of net proceeds of said sale in his hands; one other equal [one-third] part to the defendant C.... D.... [*continue in same way with other owners*]; and that he take receipts for all such payments and

file them with his report of such proceedings subsequent to confirmation of sale.

And it is further adjudged, that the purchaser [*or, purchasers*] at such sale be let into possession of the tracts purchased by him [*or, them respectively*], and that any of the parties to this action who may be in possession of said premises, or any part thereof, and any persons claiming, or who have come into, possession under them or either of them, since the filing of notice of the pendency of this action, do deliver possession to such purchaser [*or, purchasers*] entitled to such tract, on the production of said sheriff's deed.

And it is further adjudged, that any party interested, be at liberty, at any time hereafter, upon notice and motion, to apply to the court for such further order or direction as may be necessary for the disposition, investment, distribution or otherwise, of the proceeds of said sale remaining unpaid or invested.

And it is further adjudged, that the said sheriff [*or, referee*] do make report of his proceedings under this judgment with all convenient speed.

By the Court:

N.... O...., Judge.

2128. Report of sheriff or referee of his proceedings under judgment.

[*Title.*]

To the Court of County.

Pursuant to the judgment of this court rendered in this action on the day of, 19.., I, sheriff of county [*or, referee herein*], do respectfully report that I have complied with the provisions of said judgment, as follows, to-wit:

I have executed and delivered to the purchaser(s) at the sale made herein and confirmed by said judgment, conveyances of the premises sold as directed by said judgment, that is to say [*name the purchasers and the premises conveyed to each*].

That I have taken bond(s) and mortgage(s) to secure the payment of the purchase money for which credit was given as follows, to-wit [*fully describe the several securities, amounts, interest and dates when payable*].

That I have paid out the moneys in my hands as directed by said judgment, as follows [*set forth payments*].

That I have deposited said bond(s) and mortgage(s) with the clerk of the court, and sufficient money to pay the fees for recording the same.

That attached hereto are the receipts [and releases] taken by me upon such payments.

All of which is respectfully submitted.

[*Date.*]

R.... S....,
Sheriff [*or, Referee*].

2129. Order confirming last report.

[Title.]

[Caption as in Form 7.]

On reading and filing the report of R.... S...., sheriff of county [*or*, referee], in this action, bearing date the day of, 19.., by which it appears that he has fully complied with the directions to him contained in the judgment in this action.

On motion of G.... H...., attorney for the plaintiff,

IT IS ORDERED, that the said report be, and the same is hereby, in all respects confirmed. By the Court:

N.... O...., Judge.

2130. Order appointing commissioners to partition water power (Wis. Stats. 1898 sec. 3150).

[Title.]

[Caption as in Form 7.]

This action having been brought to a hearing upon the complaint of the plaintiff, and the answers of the defendants, and it appearing to the court that it is necessary in order to determine the rights of the parties to appoint commissioners to examine into the matters complained of as authorized by the statute;

Now on motion of G.... H...., plaintiff's attorney, after hearing J.... K...., attorney for the defendants,

IT IS ORDERED, that L.... M.... and N.... O.... of in said county, be and they are hereby appointed commissioners for the purpose of examining into the matters complained of, and are directed, after having taken and filed the oath required by the statute, to proceed with reasonable dispatch to investigate the matters complained of by the plaintiff, all of which are referred to them by this order; to take [upon due notice to all parties] all competent and pertinent evidence offered by the parties touching the matters at issue herein, applying such tests as the nature of the case may require, to ascertain and determine the rights of the parties and the manner of using and exercising such rights, interrupting as little as may be the operations of the owners or occupants of such water power in the use thereof; and said commissioners are further directed and empowered to determine the rights of the parties and the manner of the use of such water power and apportion, or determine the basis for the apportionment of such expenses between the persons or parties liable to contribute therefor, and report their determination with all the facts and a full statement of their experiments and the evidence taken by them to the court with all convenient speed.

By the Court:

R.... S....,

Circuit Judge.

2131. Report of commissioners to partition water power (Wis. Stats. 1898 sec. 3151).

[*Title.*]

To the Circuit Court of County.

The undersigned commissioners appointed by the court in this action by order dated, 19..., hereby make report, that having taken and filed the oath required by law they have examined into the matters complained of in this action and find:

First. That the water power in question is formed by a dam located upon [*here describe dam, with particularity, its height and head under normal conditions*].

Second. That the following parties to this action have rights and interests in said dam and water power, as follows [*here state specifically the interest of each owner*].

Third. That the basis of partition of said water power between the parties is as follows [*state basis fully, for instance, if the grants are of square inches of water under a certain head*], that it is assumed that a square inch of water under a foot head is equivalent to such amount of water as would pass under natural conditions through an opening one square inch in area cut in the side of the flume at the given head. [*See Janesville Cotton Mills v. Ford, 82 Wis. 416.*]

Fourth. That upon this basis the parties are entitled to draw from said water power the following amounts of water, viz.:

The plaintiff has a prior and paramount right to draw as many cubic feet of water as will flow under natural conditions through an aperture inches square in area cut in the flume at a foot head.

The defendant C.... D.... is entitled, etc. [*follow with a statement of the rights of each party*].

Fifth. That the manner of use by each of said owners be regulated as follows [*here give the same as the commissioners determine*].

Sixth. That the following repairs are necessary upon said dam for the proper use of the same and the creation of the full amount of water; that such repairs are estimated to cost not to exceed dollars [*state repairs particularly which are necessary to be made*].

Seventh. That the parties should defray the expenses of such repairs and changes in the following proportions [*state proportions*].

Eighth. That the compensation and expenses of said commissioners are fixed as follows [*state same in items*].

All of which is respectfully submitted.

L.... M....,
N.... O....,
Commissioners.

2132. Judgment for partition of water power (Wis. Stats. 1898 sec. 3152).

[Title.]

[Caption as in Form 7.]

[Recital of reference and report, following substantially the manner indicated in Form 2123.]

IT IS ADJUDGED: *First.* That the report of said commissioners be and is hereby in all things confirmed.

Second. That the said plaintiff A.... B.... is entitled to and has a paramount right to draw and use cubic feet of water per minute, computed under a foot head.

Third. That subject to the right of said plaintiff, the defendant C.... D.... is entitled to and has a right to draw and use cubic feet of water per minute, computed under a foot head.

[Follow with the rights of all parties.]

Fourth. And it is further adjudged that partition be made of said water power, created by the dam described in the complaint at in the county of, according to their respective rights and interests as above set forth.

Fifth. That the repairs and changes in said dam recommended by said commissioners are necessary, and that the expenses of such repairs and changes be defrayed by the parties in the following proportions [name proportions]. That the costs and expenses of this action taxed and allowed at dollars be apportioned among the parties in the same proportions, and that each party pay his proportion thereof to the plaintiff's attorney within days after notice of the entry of this judgment, and upon failure so to do the plaintiff have execution therefor.

By the Court:

R.... S....,

Circuit Judge.

CHAPTER CXLVII.

JUDGMENTS AND PROCEEDINGS AFTER TRIAL IN EJECTMENT.

- | | |
|---|---|
| 2133. Judgment for plaintiff in ejectment (Wisconsin). | 2140. Affidavit for statutory new trial in ejectment (Wisconsin). |
| 2134. Affidavit stating defendant's claims for improvements and taxes paid, in order that issue thereon may be tried before judgment for plaintiff (Wisconsin). | 2141. Order granting statutory new trial (Wisconsin). |
| 2135. Defendant's notice of motion for assessment of value of improvements made and taxes paid, after plaintiff's recovery in ejectment (Wisconsin). | 2142. Undertaking required by last preceding order as condition of new trial in ejectment (Wisconsin). |
| 2136. Order for trial of issue as to defendant's improvements and taxes paid in ejectment under preceding application (Wisconsin). | 2143. Order setting off sums paid by defendant for taxes against damages, and requiring plaintiff to pay the excess as a condition of judgment (Wisconsin). |
| 2137. Judgment for plaintiff in ejectment, setting off value of improvements and taxes paid (Wisconsin). | 2144. Judgment where plaintiff's title expired before trial. |
| 2138. Order on the foot of preceding judgment, making same absolute in defendant's favor (Wisconsin). | 2145. Application by defendant to purchase plaintiff's interest after judgment, where defendant has erected a building in part on the land recovered (Wisconsin). |
| 2139. Judgment for plaintiff where defendant relies on defective tax deed, and the amounts paid by him for the deed and subsequent taxes are set off (Wisconsin). | 2146. Order thereon fixing bond and providing for making up of issue (Wisconsin). |
| | 2147. Bond required by last preceding order (Wisconsin). |
| | 2148. Order making up issues on foregoing application (Wisconsin). |

The forms in this chapter are prepared with special reference to the Wisconsin statutes governing ejectment, which are more explicit and extended on this subject than the statutes of the other states covered by this work. It is believed that there will be little difficulty in adapting the forms given to the practice in the other states.

2133. Judgment for plaintiff in ejectment (Wis. Stats. 1898 sec. 3086).

[Title.]

[Caption as in Form 7.]

The above entitled action having been tried before the court and a jury;

And the jury having duly rendered their verdict wherein they find that the plaintiff is the owner in fee simple [*or describe the estate according to the fact*] of the premises described in the complaint [*or, of that portion of the premises described in the complaint particularly described as follows, insert description of part recovered*] and entitled to the possession thereof, and that the defendant unlawfully withholds possession thereof from him; and having assessed the plaintiff's damages for such unlawful withholding, at the sum of dollars. *

Now, on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the plaintiff A.... B.... is the owner in fee simple of, and that he do have and recover of the defendant C.... D.... the possession of the premises described in the complaint [*or, if only a part, describe the part*].

Further it is adjudged that the plaintiff do have and recover of said defendant the sum of dollars, his damages for the withholding of said premises, and his costs of this action, taxed at dollars, amounting in the whole to the sum of dollars.

By the Court:

O.... P...., Clerk.

2134. Affidavit stating defendant's claims for improvements and taxes paid, in order that issue thereon may be tried before judgment for plaintiff (Wis. Stats. 1898 sec. 3097 par. 2).

[Title.]

[Venue.]

C.... D...., being first duly sworn, says that he is the defendant in the above entitled action.

That the same is brought by the plaintiff to recover the possession of the following described premises, to-wit [*here describe the same*].

That the issues in said action were tried at the present term, and a verdict was rendered that the plaintiff recover the possession of said premises [*or if a part only was recovered describe the same*] with dollars damages for the withholding thereof.

And the affiant further says that he entered into possession of said premises, on or about the day of, 19.., under

a warranty deed thereof [*or, quitclaim deed*] duly executed, acknowledged and delivered to affiant by one L.... M.... and that affiant purchased and entered into possession of said premises in good faith believing that he had a valid title thereto by said deed. [*Or if affiant's title was by descent set forth the facts.*]

That he has remained in possession of said premises from said entry until the present time, holding adversely to the plaintiff, and exclusive of his and every other right, and has during all said time asserted his title in good faith, founded on said deed [*or, founded on his said rights by descent*].

That while so in possession and holding the same, he has made permanent and valuable improvements on the said premises, as follows [*here state nature and value of improvements made in items*].

That he has, while so in possession and holding the same, paid as taxes assessed on said premises the following amounts, on the dates named, to-wit:

19... December 24..... \$——

[*set forth other payments in like manner*].

WHEREFORE defendant hereby makes application for the recovery of the value of said improvements, and the amount of taxes so paid, and interest thereon; and that the same may be declared a lien on said premises; that proceedings be stayed on the verdict in this action until due proceedings have been had for the ascertainment of the amounts the defendant is entitled to recover; and that the defendant have judgment for the amount due him after setting off the same against the plaintiff's damages, and for such other relief, order or judgment as may be proper in the premises.

C.... D....

[*Jurat.*]

2135. Defendant's notice of motion for assessment of value of improvements made and taxes paid after plaintiff's recovery in ejectment (Wis. Stats. 1898 sec. 3097 par. 2).

[*Title.*]

Take notice that upon the pleadings, proceedings and verdict in this action and the affidavit of C.... D.... a copy of which is served herewith the defendant will move the court, at the present term, at the court house, in the city of, in said county, on the day of, 19..., at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order making up an issue between the parties to the above

entitled action, in which the defendant shall be plaintiff and the plaintiff herein shall be defendant, for the trial of defendant's claim for improvements made by him upon said premises recovered herein, and for the taxes paid thereon by him, and the assessment of the amount thereof as provided by section 3097 of the revised statutes of Wisconsin, and for such other or further order as may be proper.

[Date.]

J.... K....,
Defendant's Attorney.

2136. Order for trial of issue as to defendant's improvements and taxes paid in ejectment under preceding application (Wis. Stats. 1898 sec. 3097 par. 2).

[Title.]

[Caption as in Form 7.]

The defendant having applied herein, after verdict, for an order that an issue be made up between the parties hereto as to defendant's claim for permanent and valuable improvements made by him upon the premises described in the complaint herein and the value thereof and the amount and date of the taxes paid by him thereon, and his motion therefor having come on to be heard at said term upon the pleadings and verdict herein, and upon the affidavit of C.... D...., defendant.

After hearing J.... K...., attorney for the defendant for the motion, and G.... H...., attorney for the plaintiff, in opposition thereto, and being advised in the premises,

IT IS ORDERED, that the following issues between the parties be tried at the present [*or, next regular*] term of this court, viz. [*here state issues, as for instance*]:

(1) What amount of permanent and valuable improvements were made by defendant upon the premises described in the complaint, while holding the same adversely in good faith under color of title?

(2) [*State issue as to taxes paid.*]

Further ordered, that no judgment be entered in this action, upon the verdict rendered herein, until after the trial of said issue and upon further order of the court.

By the Court:

O.... P...., Judge.

2137. Judgment for plaintiff in ejectment, setting off value of improvements and taxes paid (Wis. Stats. 1898 sec. 3098).

[Title.]

[Caption as in Form 7.]

The issues in this action, having been tried before the court and a jury; and the jury having returned their verdict, wherein

they find for the plaintiff, that he is the owner in fee, and entitled to the possession of the premises described in the complaint [*or if part is recovered describe the part*] and having assessed his damages for the withholding at the sum of dollars;

And the said defendant's counterclaim for improvements made and taxes paid upon the said premises having been tried by the same jury, and the jury having rendered their separate verdict that the defendant is entitled to recover for the value of such improvements, the sum of dollars, and for the taxes paid by him, with interest thereon, from the time of such payment, making together the sum of dollars.

[*In case there was no counterclaim but the issue as to taxes and improvements was tried after verdict in an issue made up for that purpose insert in place of the last paragraph*]: And the defendant, after the verdict, having made claim for improvements made and taxes paid by him upon said premises, and the court having made up an issue thereon between the parties which issue has been tried before a jury, and a verdict rendered finding that the defendant is entitled to recover the value, etc. [*conclude as in last preceding paragraph*].

Now, on motion of G.... H...., attorney for plaintiff,

IT IS ADJUDGED: 1. That the plaintiff is the owner in fee simple [*or otherwise according to the fact*] and entitled to the possession of the premises described in the complaint [*or if part be recovered describe the part*] and that he have and recover the possession thereof.

2. That the amount found as aforesaid for improvements and taxes paid, to-wit, the sum of dollars, be set off against the amount of costs and damages, which costs and damages amount to the sum of dollars, leaving a balance due the defendant of the sum of dollars, and that the plaintiff pay the said balance so due the defendant, with interest, from the date of said [first mentioned] verdict, within three years from the date of said verdict, as a condition of execution; and that the plaintiff have no claim for rents and profits, while said balance and interest remain unpaid.

And it is further adjudged, that in default of such payment within said three years from the date of such assessment, to-wit, the day of, 19.., the plaintiff shall be deemed to have abandoned his claim of title to the premises above described, and together with all persons claiming under him, shall be forever barred of a recovery thereof, and of claim of title thereto; and the title to said premises shall be deemed absolutely vested in the defendant, and the defendant, in such event,

shall recover the costs of the separate trial of the value of such improvements, taxed at dollars.

And it is further adjudged, that upon payment to the defendant of said sum of dollars, and interest from the date of said verdict, pursuant to law, the plaintiff have execution for the premises recovered by him and hereinbefore described.

By the Court:

L.... M...., Clerk.

2138. Order on the foot of preceding judgment, making same absolute in defendant's favor, (Wis. Stats. 1898 sec. 3099).

[*Title.*]

[*Caption as in Form 7.*]

Application having been made upon the record in this action and the affidavit of C.... D.... for an order declaring the judgment rendered herein on the day of, 19..., absolute in favor of the defendant; and due notice of such application having been given; and the same coming on to be heard, at said term, upon the record herein and said affidavit; and it appearing satisfactorily from said affidavit that the plaintiff has failed to make the payments required in said judgment as a condition of execution thereon in his favor; after hearing J.... K...., attorney for the defendant, and G.... H...., attorney for the plaintiff, in opposition thereto,

IT IS ORDERED and declared that said plaintiff has failed to make the payment required by said judgment as a condition of execution; that the said judgment has become absolute in favor of defendant [and that the defendant have execution thereon for his costs of the separate trial, to-wit, the sum of dollars and interest].

Let this order be entered upon the foot of said judgment.

By the Court:

O.... P...., Judge.

2139. Judgment for plaintiff, where defendant relies on defective tax deed, and the amounts paid by him for the deed and subsequent taxes are set off (Wis. Stats. 1898 sec. 3087).

[*Commencement as in Form 2133 to the * and inserting*]:

And it appearing to the court that the defendant claims title to the said premises in this action under a certain tax deed thereof issued by the county of, Wisconsin, on the day of, 19..., and that the plaintiff has recovered in this action by reason of defects or insufficiency of said deed;

And it further appearing that the amount for which said land was sold at said tax sale with the costs of executing and

recording the said deed, is the sum of dollars, and that the defendant has paid taxes on said lands subsequent to said tax sale as follows [*give dates and amounts*] :

IT IS ORDERED, that the said sums with interest on the same at the rate of fifteen per cent per annum, from the respective dates of payment thereof up to the date of the verdict herein, aggregating in all the sum of dollars be and are hereby set off against the said damages, and ** [*if damages exceed the taxes*], that the plaintiff recover the excess of damages only in this action, to-wit, the sum of dollars;

Now, on motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED [*continue with judgment as in Form 2133*].

2140. Affidavit for statutory new trial in ejectment (Wis. Stats. 1898 sec. 3092).

[*Title.*]

[*Venue.*]

C.... D...., being first duly sworn, says that he is the defendant in the above entitled action.

That the same is an action of ejectment to recover possession of the following described premises, viz. [*describe same*].

That the issues herein were tried at the term of this court and a verdict for the plaintiff rendered therein on the day of, 19.., by which the plaintiff was found to be entitled to the possession of said premises [*or the following described part of said premises, describe same*].

That judgment was rendered on said verdict on the day of, 19.., for [*set forth terms of judgment*].

That the defendant has paid all the costs recovered in said judgment, and the defendant hereby applies for a new trial in this action, as allowed him by law.

C.... D....

[*Jurat.*]

2141. Order granting statutory new trial (Wis. Stats. 1898 sec. 3092).

[*Title.*]

[*Caption as in Form 7.*]

Upon the judgment roll in this action, and the affidavit of the defendant, from which it appears that the costs recovered in the judgment in this action have been paid, and on motion of J.... K...., attorney for the defendant,

IT IS ORDERED, that the judgment in this action be vacated and a new trial granted herein, upon condition that defendant execute and file an undertaking with sufficient sureties, in the sum of dollars, to the effect that he will pay all

costs and damages, which may be finally awarded the other party in this action; such sureties to justify their responsibility as required by law.

By the Court:

O.... P...., Judge.

2142. Undertaking required by last preceding order as condition of new trial in ejectment (Wis. Stats. 1898 sec. 3092).

[*Title.*]

Whereas C.... D.... the above named defendant has applied for a second trial of this action under the provisions of sec. 3092 Statutes of Wisconsin 1898 [and has paid all the costs recovered herein], and the court upon such application has vacated the judgment herein and granted said new trial, upon condition that an undertaking with sufficient sureties be executed and filed in the amount and to the effect specified in said order:

Now therefore we C.... D.... as principal and W.... X.... and Y.... Z.... as sureties, all of in said county, do hereby undertake in the sum of dollars that the said C.... D.... will pay all costs and damages which may be awarded to the said plaintiff in this action.

[*Date.*]

C.... D....
W.... X....
Y.... Z....

[*Justification by sureties as in Form 191.*]

2143. Order setting off sums paid by defendant for taxes against damages, and requiring plaintiff to pay the excess as a condition of judgment (Wis. Stats. 1898 sec. 3087).¹

[*Proceed as in Form 2139 to the ** and continuing*], it appearing that the excess due the defendant after making such set-off is the sum of dollars,

¹ Where the amount for which the land was sold at tax sales and the taxes subsequently paid thereon by defendant exceed the damages recovered, it is correct practice to enter a conditional order and not a conditional judgment. *Hewitt v. Wis. River Land Co.*, 81 Wis. 546. When the action was tried by the court such order may be incorporated at the close

of the findings of fact and conclusions of law, as in *Chippewa R. L. Co. v. J. L. Gates L. Co.*, 118 Wis. 345. If the order be complied with plaintiff should apply to the court for judgment on affidavit showing compliance, and judgment will then be entered in his favor, which may be substantially as in Form 2133, reciting the order requiring payment and the compli-

It is further ordered that as a condition of judgment in his favor the plaintiff, within ninety days from the date of this order, pay to the defendant the said sum of dollars [*excess aforesaid*], with interest from the date of the said verdict to the time of such payment, and that in default of such payment the defendant shall have judgment in this action.

Upon compliance by the plaintiff with the terms of this order let judgment be entered in his favor for the recovery of the possession of said premises.

By the Court:

O.... P...., Judge.

2144. Judgment where plaintiff's title expired before trial.²

[*Title.*]

[*Caption as in Form 7.*]

This action having been tried before the court and a jury, and the jury having returned their verdict that the plaintiff, at the time of the commencement of this action, was the owner of a life estate [*or other estate according to the fact*] in the said premises and entitled to the possession thereof, and that said estate terminated on the day of, 19.., during the pendency of this action, and that the defendant unlawfully withheld possession of said premises from the plaintiff during said time, and the plaintiff's damages for such unlawful withholding having been assessed at dollars,

Now on motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED that the plaintiff recover of the defendant dollars damages for the withholding of the premises described in the complaint prior to the day of, 19.., when the plaintiff's title expired, and dollars costs of this action, amounting in the whole to dollars.

And as to possession of said premises: It is adjudged, that the defendant go without day.

By the Court:

O.... P...., Clerk.

ance therewith, but giving no judgment for damages. In case the payment be not made, on proof by affidavit of that fact judgment dismissing the complaint should be entered.

²When the plaintiff shows a right to recover at the time of the commencement of the action but it appears that such right has ter-

minated during the pendency of the action the verdict and judgment must be according to the fact and the plaintiff recovers damages only. Minn. Rev. Laws 1905 sec. 4429; N. Dak. Rev. Codes sec. 5909; S. Dak. Rev. Codes C. P. 680; Iowa Code sec. 4197; Cobbe's Ann. Stats. Nebr. sec. 1641.

2145. Application by defendant to purchase plaintiff's interest after judgment, where defendant has erected a building in part on the land recovered (Wis. Stats. 1898 sec. 3100a).^s

[*Title.*]

To the Court of County.

The application of C.... D...., the defendant above named, respectfully shows [*set forth proceedings and verdict in the action as in Form 2134 adding statement of rendition and entry of judgment*].

That your petitioner entered into possession of said premises on or about the day of, 19.., under [*here set forth nature of title and adverse holding according to the fact, so as to show that the case comes within sec. 3100a, substantially in the manner set forth in Form 2134, adding statement of the erection of the building in part upon the premises, its value and the fact that it cannot be moved without serious injury*].

Your petitioner further states that he desires to purchase the interest of plaintiff in said land, and he therefore prays that an issue between the parties be made up and tried as provided by law, that this court fix the amount of the bond to be given by petitioner to stay the execution of said judgment pending the trial of such issue, that petitioner be granted the right to pay any judgment entered upon the verdict to be rendered upon the trial of said issue and acquire the estate of the plaintiff in said premises, and for such further relief as may be just.

C.... D....

[*Add verification, also give notice of motion substantially as in Form 2135 with proper changes to show object of motion.*]

2146. Order thereon fixing bond and providing for making up of issue (Wis. Stats. 1898 sec. 3100b).

[*Title.*]

The application of the defendant C.... D.... for an order making up an issue in this action under section 3100a Wis. Stats. 1898, coming on to be heard before the court, on the record and proceedings in the action and the verified application of said defendant, on this day of, 19.., at, and due notice of such application having been served; * after hearing J.... K...., Esq., for defendant and G.... H...., Esq., for the plaintiff,

^s This and the following forms are prepared for use under Wis. Stats. 1898 sec. 3100a. This is a new statute and its constitutionality has been doubted. In a note

to the section reference is made to *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, as tending to sustain the law.

IT IS ORDERED, that the said defendant, within days from this date, execute and file with the clerk of this court a bond in the sum of dollars, with two sufficient sureties to be approved by the court, conditioned that the said defendant will abide by, perform and pay such judgment as may be rendered upon the issue to be made up in this action upon said application, or such judgment as may have been entered in the original action as the event may require, including the value of the use of the premises after the original judgment;

And it is further ordered that upon the filing and approval of such bond an issue be made up between the parties in which the said defendant shall be the plaintiff and the ejectment plaintiff shall be defendant, and that such issue stand for trial by the jury at the present [*or, next*] term of this court, and that the enforcement of such original judgment be stayed, except the collection of costs, until the trial and determination of the issue so made up.

2147. Bond required by last preceding order (Wis. Stats. 1898 sec. 3100b).

[*Title.*]

KNOW ALL MEN, etc. [*follow Form 98, inserting name of plaintiff instead of infant up to and including the date, and continue with conditions as follows*]:

Whereas, the above-named plaintiff on the day of, 19.., obtained judgment in this court in an action of ejectment against the defendant for the recovery of the following described premises [*describe lands*] and for the sum of dollars damages and costs, and

Whereas, the said defendant has made application to this court for the purchase of said lands under the provisions of sec. 3100a Wis. Stats. 1898, and upon the hearing of said application the court having ordered the giving of a bond, with two sufficient sureties to be approved by the court, conditioned as provided by section 3100b of the said statutes;

NOW THEREFORE the condition of this obligation is such that if the said C.... D.... shall abide by, perform and pay such judgment as may be rendered upon the issue made upon his said application, or such judgment as may have been entered in the original action as the event may require, including the value of the use of the said premises after the original judgment, then this obligation to be void; otherwise of force.

In presence of

[*two witnesses.*]

[*Acknowledgment and approval as in Form 98.*]

C.... D.... [Seal]

W.... X.... [Seal]

Y.... Z.... [Seal]

2148. Order making up issues on foregoing application (Wis. Stats. 1898 sec. 3100a).

[Title.]

*[Proceed as in last preceding form to the * and continuing] :* and this court having ordered the giving of a bond executed by the defendant, with sureties, as required by law, and the said bond having been executed and filed in accordance with said order and approved by this court; and it appearing that the said verified application satisfies the requirements of section 3100a Wis. Stats. 1898, and requires the making up of an issue as required by said section; the court having heard the parties and being now fully advised,

IT IS ORDERED that the following issues be made up and tried between the parties at the present [*or, next*] term of this court [*here state questions in form of a special verdict which if answered affirmatively will bring case within sec. 3100a; also the questions required by sec. 3100c*].

By the Court:

O.... P...., Judge.

CHAPTER CXLVIII.

ORDERS OR JUDGMENTS AFTER TRIAL.

- | | |
|---|---|
| <p>2149. Order sustaining demurrer.</p> <p>2150. Order overruling demurrer.</p> <p>2151. Order sustaining demurrer in part, and overruling it in part.</p> <p>2152. Judgment for plaintiff after order overruling demurrer.</p> <p>2153. Judgment for defendant, after order sustaining demurrer.</p> <p>2154. Judgment of non-suit.</p> <p>2155. Judgment on general verdict.</p> <p>2156. The same, where offer of judgment is not accepted and plaintiff's recovery is less than amount offered.</p> <p>2157. Judgment in favor of all the plaintiffs, against a part of the defendants.</p> <p>2158. Judgment in favor of a part of the plaintiffs, against all the defendants.</p> <p>2159. Judgment in favor of a part of the plaintiffs, against a part of the defendants.</p> <p>2160. Judgment after stipulation reducing verdict.</p> <p>2161. Judgment on verdict subject to opinion of the court.</p> <p>2162. Judgment on special verdict.</p> <p>2163. Judgment after verdict on issue of fact as to some defendants, others having</p> | <p>made default, and a reference having been had as to them.</p> <p>2164. Judgment on trial of issues of fact by the court.</p> <p>2165. The same, where a reference has been had after trial and before final judgment.</p> <p>2166. Judgment upon trial as to one defendant, and default as to another defendant.</p> <p>2167. The same, where there are defendants not answering, as to whom proof of facts is necessary, and is taken by the court without reference.</p> <p>2168. Judgment where part of the issues were tried with a jury, and a part without, and questions of law were reserved.</p> <p>2169. Judgment on report of referee, for plaintiff.</p> <p>2170. The same, for defendant.</p> <p>2171. Judgment where an issue of fact as to one defendant has been tried by a referee, and a reference had on default of other defendants, and exceptions have been taken to the report.</p> |
|---|---|

2149. Order sustaining demurrer.

[Title.]

[Caption as in Form 7.]

This action having been brought to trial on the issue of law joined herein, after hearing G.... H.... in support of the demurrer, and J.... K.... [*or*, no one appearing] in opposition:

ORDERED, that said demurrer be sustained, and that defendant [*or*, plaintiff] have judgment thereon; but with leave to the plaintiff [*or*, defendant] to amend the complaint [*or*, answer, *or*, reply] within twenty days, on payment of dollars costs.

By the Court:

O.... P...., Judge.

2150. Order overruling demurrer.

[Title.]

[Caption as in Form 7.]

This action having been brought to trial on the issue of law joined herein, after hearing G.... H.... in support of the demurrer, and J.... K.... [*or*, no one appearing] in opposition:

ORDERED, that said demurrer * be overruled, and that plaintiff [*or*, defendant] have judgment thereon; but with leave to the defendant [*or*, plaintiff] to withdraw his demurrer [and put in an answer, *or*, a reply] within twenty days, on payment of dollars costs.

By the Court:

O.... P...., Judge.

2151. Order sustaining demurrer in part, and overruling it in part.

[*As in last previous form to the *, and continue*]: to the first cause of action set forth in the complaint be sustained; and that the defendant have judgment thereon; and that the demurrer to the second cause of action be overruled; and that the plaintiff have judgment thereon, but with leave to the plaintiff to serve an amended complaint within days, and to the defendant to withdraw his demurrer to the second cause of action, and to answer the same [*add direction as to costs*].

2152. Judgment for plaintiff after order overruling demurrer.

[Title.]

[Caption as in Form 7.]

The order of the court overruling the demurrer to the complaint herein and ordering judgment in favor of the plaintiff in this cause upon the said demurrer, with the usual leave to defendant to answer, having been served on the defendant's attorney on the day of, 19.., and the defendant not having elected to answer; and the plaintiff's damages having been ascertained by reference [*or*, having been assessed by a jury under the direction of the court, *or* by the court, assessment by jury having been waived];

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED, that the plaintiff recover of the defendant dollars, with dollars costs of the action, making together dollars [*or state special relief as in following chapter*].

By the Court:

O.... P...., Judge.

2153. Judgment for defendant, after order sustaining demurrer.

[Title.]

[Caption as in Form 7.]

An order having been entered in this action, on the day of, 19.., sustaining the demurrer to the complaint herein and giving the said plaintiffs leave to amend their complaint herein within twenty days after service of such order upon their attorneys, and giving the said defendants twenty days after service of such amended complaint upon their attorneys, to demur or answer to said amended complaint, and directing that if the said plaintiffs should fail, within that time, to amend their said complaint, that the same be dismissed, and judgment entered herein, in favor of the defendants herein; and a copy of said order having been served on said attorneys, on the day of, 19.., and more than twenty days having elapsed since such service, and the said plaintiffs having failed to amend their said complaint, as by said order allowed:

Now, on motion of J.... K...., attorney for the said defendants,

IT IS ORDERED AND ADJUDGED, that the complaint herein be, and the same is hereby dismissed, and that the defendants have and recover their costs of the said plaintiffs taxed at dollars.

By the Court:

O.... P...., Judge.

2154. Judgment of nonsuit.

[Title.]

[Caption as in Form 7.]

This action being at issue and having been tried before the court and a jury and the allegations and proofs on the part of the plaintiff having been heard and considered, and said judge having directed the complaint to be dismissed, and judgment of nonsuit rendered for defendant; now, on motion of M.... N...., for said defendant:

IT IS ADJUDGED, that the complaint be dismissed and that defendant recover of the plaintiff dollars, his costs and disbursements of this action.

By the Court:

O.... P...., Clerk.

2155. Judgment on general verdict.

[Title.]

[Caption as in Form 7.]

This action being at issue and having been brought on for trial before the court and a jury, and * the issues having been tried,

****** and a general verdict for the plaintiff [*or*, defendants] having been duly rendered on the day of, 19.., *******

Now, on motion of G.... H...., for said,

IT IS ADJUDGED, that said plaintiffs recover of said defendants dollars found by the jury, with dollars costs [*or*, that the defendants have judgment against the plaintiff, upon the issues in this action, for the sum of dollars] [*or, state special relief as in the appropriate form in the following chapter*].

By the Court:

O.... P...., Clerk.

2156. The same, where offer of judgment is not accepted and plaintiff's recovery is less than amount offered.¹

[*Recital of proceedings, trial and verdict as in last preceding form and continuing*]: and it appearing that the defendant before trial offered, in writing, to allow the plaintiff to take judgment against him for the sum of dollars [*or*, for the recovery of, *specify the offer made*] which offer was not accepted by the plaintiff, and the plaintiff not obtaining a more favorable judgment than so offered,

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the plaintiff recover of the defendant the sum of dollars his damages so found and that the defendant recover of the plaintiff dollars, his costs from the time of said offer, to be deducted from the plaintiff's said recovery leaving a residue of dollars due the plaintiff for which he shall have execution.

By the Court:

O.... P...., Clerk.

2157. Judgment in favor of all the plaintiffs, against a part of the defendants.

[*As in Form 2155 to the **, continuing*]: and a verdict having been rendered in favor of all the plaintiffs against the defendants [*naming the unsuccessful defendants*], and in favor of the defendant [*naming successful defendant*], against all the plaintiffs:

Now, on motion of G.... H...., for the plaintiffs,

¹ Wis. Stats. 1898 sec. 2789; sec. 472; Iowa Code sec. 3819; Minn. Rev. Laws 1905 secs. 4196, Cobbeys Ann. Stats. Nebr. sec. 4197; N. Dak. Rev. Codes 5639-1575. 5642; S. Dak. Rev. Codes C. P.

IT IS ADJUDGED that the said plaintiffs recover of the defendants [*naming them*] dollars, found by the jury, with dollars costs of action, making together dollars [*or, state special relief as in appropriate form in following chapter*].

And on motion of J.... K...., for the defendants, it is further adjudged that the complaint be dismissed on the merits of the action, as against the defendant [*naming him*], and that he recover of all the plaintiffs dollars costs of the action.

2158. Judgment in favor of a part of the plaintiffs, against all the defendants.

[*As in Form 2155 to the **, continuing*]: and a verdict having been rendered in favor of the plaintiffs [*naming the successful plaintiffs*], against all the defendants, and in favor of the said defendants against the plaintiff [*naming the unsuccessful plaintiff*]:

Now, on motion of G.... H..., for the plaintiff,

IT IS ADJUDGED that the said plaintiffs [*naming them*], recover of all the defendants dollars, found by the jury, with dollars costs of the action, making together dollars [*or, state special relief as in appropriate form in following chapter*].

And it is further adjudged, on motion of J.... K...., for the defendants, that as to the plaintiff [*naming him*], the complaint be dismissed upon the merits of the action, and that the defendants recover of the said plaintiff dollars, costs of the action.

2159. Judgment in favor of a part of the plaintiffs, against a part of the defendants.

[*As in Form 2155 to the **, continuing*]: and a verdict having been rendered in favor of the plaintiffs [*naming the successful plaintiffs*], against the defendants [*naming them*], and against the plaintiff [*naming the unsuccessful plaintiff*], in favor of all the defendants, and in favor of the defendant [*naming him*], against all the plaintiffs:

Now, on motion of G.... H...., for the plaintiffs,

IT IS ADJUDGED that the said plaintiffs [*naming them*], recover of the defendants [*naming them*], ... dollars, found by the jury, with dollars costs of the action, making together dollars [*or, state special relief as in appropriate form in following chapter*].

And it is further adjudged, that as to the said plaintiff [*nam-ing him*], the complaint be dismissed upon the merits of the action, as against all the defendants, and that they recover of the said [*nam-ing him*], ... dollars costs of the action.

And it is further adjudged, that the complaint be dismissed on the merits of the action, as against the defendant [*nam-ing him*], and that he recover of all the plaintiffs dollars, costs of the action.

2160. Judgment after stipulation reducing verdict.

[*As in Form 2155, inserting at ****]: and the plaintiffs having stipulated to deduct from the said verdict the sum of dollars, with interest thereon, as provided in the order entered herein the day of, 19.. *

2161. Judgment on verdict subject to opinion of the court.

[*As in Form 2155 to the ** continuing*]: and a verdict having been taken for the plaintiff subject to the opinion of the court and judgment having been ordered in favor of the plaintiff [*or, defendant*], after argument of the question of law:

Now on motion of G.... H.... for the plaintiff, after hearing J.... K.... for the defendant,

IT IS ADJUDGED, etc. [*as in other forms*].

2162. Judgment on special verdict.

[*As in Form 2155 to the ** and continuing*]: and a special verdict having been duly rendered on the day of, 19.., as follows [*here insert special verdict at length*].

Now on motion of G.... H...., for the plaintiff,

IT IS ADJUDGED, etc. [*as in other forms*].

2163. Judgment after verdict on issue of fact as to some defendants, others having made default, and a reference having been had as to them.

[*Title.*]

[*Caption as in Form 7.*]

This cause having been brought on for hearing upon the verdict of the jury rendered upon the issues of fact made and settled in this action, and submitted to said jury, and proof having been made and filed of the service of the summons in this action upon all the defendants, more than twenty days since, and personally on all [except the unknown owners, and the defendant W.... V...., who is an absentee, who have all been served by publication, pursuant to an order heretofore made herein], and

that no demurrer or answer has been put in on behalf of any defendant, except the defendant W.... X.... [and also the defendant Y.... Z...., who is an infant, and has put in the usual general answer by his guardian *ad litem*, not controverting any material allegation in the complaint], and that the complaint, and due notice of the pendency of this action, were filed on the day of, 19.., in the office of the of the county of, And on reading and filing said proofs, and on the pleadings and proceedings in this action, including said verdict, together with the report of R.... F...., referee herein, appointed by an order of the court, bearing date on the day of, 19.., whereby it appears [etc., *briefly stating conclusion of referee*];

IT IS ADJUDGED [*continuing as in other forms*].

2164. Judgment on trial of issues of fact by the court.

[*Title.*]

[*Caption as in Form 7.*]

This action having been brought to a trial by the court [trial by jury having been duly waived], and the court having made and filed its findings of fact and conclusions of law therein and directed judgment for the plaintiff [*or, defendant*];

Now on motion of G.... H...., attorney for said

IT IS ADJUDGED, etc. [*as in other forms*].

2165. The same, where a reference has been had after trial and before final judgment.

[*Title of the cause.*]

[*Caption as in Form 7.*]

The issues in this cause having been tried by the court without a jury and the court having made its findings of fact and conclusions of law herein bearing date, 19.., and filed on the day of, 19.., and an order of reference having been made thereon on the day of, 19.., referring it to R.... F...., Esq., to [*state purpose of reference*], and the report of said referee bearing date, 19.., having been made and filed, by which it appears [*briefly stating conclusions of report*];

Now, therefore, on due proof [that the complaint and notice of the pendency of this action was filed on the day of, 19.., in the office of the clerk of the county of, and] of the service of due notice of hearing of cause on all the defendants, and on motion of G.... H.... for the plaintiff, and after hearing J.... K.... for the defendant, no one else appearing for any defendant,

IT IS ADJUDGED, etc. [*stating relief as in other forms*].

2166. Judgment upon trial as to one defendant, and default as to another defendant.

[Title.]

[Caption as in Form 7.]

This action having been brought to trial at a special term of this court upon the issues joined upon the complaint and the answer of the defendant W.... X...., and the defendant Y.... Z.... having been duly served with the summons and complaint, and having appeared by Q.... R...., his attorney, his time to answer having expired, but no answer from him having been received, and a trial having been had, and testimony having been taken, and counsel for the respective parties having been heard, and the court having made and filed its findings of fact and conclusions of law directing judgment for the plaintiff;

Now, on motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED, etc. [stating relief as in other forms].

2167. The same, where there are defendants not answering, as to whom proof of facts is necessary, and is taken by the court without reference.

[Title.]

[Caption as in Form 7.]

This cause having been brought on for hearing and trial on the issues of fact joined by the answer of the defendant, Y.... Z...., and the court having made and filed its findings of fact and conclusions of law [or, the jury having returned its verdict upon the said issues of fact for the plaintiff] and due proof being made of the filing of the complaint and of the notice of the pendency of this action, on the day of, 19..., in the office of the of the county of, [where the mortgaged premises are situated], and of service of the summons in this action more than twenty days since on all the defendants personally [except, etc., as in Form 2163], and that no demurrer or answer has been put in on behalf of any of the defendants, except the said defendant Y.... Z...., and except also the infant defendant W.... X...., who has put in the usual general answer by his guardian *ad litem*] [continuing as in other forms].

2168. Judgment where part of the issues were tried with a jury, and a part without, and questions of law were reserved.

[Title.]

[Caption as in Form 7.]

This case having been tried before the court and a jury as to certain issues and a verdict thereon rendered, and by the court without a jury as to the residue, and the court having made and filed its findings of fact and conclusions of law thereon;

Now, on motion of G.... H.... for the defendants,

IT IS ORDERED AND ADJUDGED that the complaint be, and the same is hereby dismissed [*or state relief as in other forms*].

2169. Judgment on report of referee, for plaintiff.

[*Title.*]

[*Caption as in Form 7.*]

This cause having been referred to R.... F...., Esq., to hear and determine the same, and his report having been filed, whereby he finds * to be due from the defendants to the plaintiffs the sum of dollars; and the said report and findings having been duly confirmed by the court;

Now, on motion of G.... H...., plaintiffs' attorney,

IT IS ADJUDGED that the plaintiffs do recover of the defendants the said sum, with dollars costs and disbursements, amounting in the whole to the sum of dollars [*or, state special relief as in appropriate form in following chapter*].

2170. The same, for defendant.

[*As above to the *, continuing*]: for the defendants; and said report and findings having been duly confirmed by the court;

Now, on motion of M.... N...., attorney for defendants,

IT IS ADJUDGED that the complaint herein be dismissed on the merits of the action; and that the defendants recover of the plaintiff dollars costs.

2171. Judgment where an issue of fact as to one defendant has been tried by a referee, and a reference had on default of other defendants, and exceptions have been taken to the report.

[*Title.*]

[*Caption as in Form 7.*]

This cause having been brought on for hearing, upon the pleadings and proceedings therein, including the report of R.... F...., the referee to whom the issues of fact joined by the answer of W.... X.... were referred, to hear and determine; and, also [the report of S.... F....], to whom it was referred, to compute the amount due to the plaintiff upon the bond and mortgage mentioned in the complaint [*and if there are infant defendants having answered generally, or, absentee defendants, add*, and to take proof of the facts and circumstances stated in the complaint, and examine the plaintiff or his agent on oath as to any payments made, and which ought to be credited on said bond and mortgage], which report was filed on the day of, 19.. [and, also, upon the exceptions to said report, made and filed thereto on behalf of the defendant W....

X....]; and due proof having been made by affidavit of G...., H.... [of the filing of the complaint, and notice of *lis pendens* in the office of the clerk of the county of, on the day of, 19.., and] of the service of summons in this action on all the defendants, more than twenty days since; and that no demurrer or answer has been put in on behalf of any of the defendants, except the defendant W.... X...., the issue joined on which was referred as aforesaid, which affidavit of G.... H.... has been filed;

Now, therefore, on the coming in of said report [with the exceptions thereto], and after hearing counsel for the respective parties, on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the said report of the said referee be, and the same hereby is, in all things, confirmed [and that the said exceptions be overruled and disallowed, *or, where any exceptions are sustained, say*, that the first and third of said exceptions be, and the same hereby are overruled, and the second exception is allowed; and that said report is modified accordingly, by reversing the finding of said referee on the matter so excepted to in the second exception, and disallowing, etc., *stating the modification*; and that said report, as so modified, hereby is confirmed].

And it is further adjudged [*etc., as in appropriate forms in following chapter*].

CHAPTER CXLIX.

JUDGMENTS IN VARIOUS SPECIAL CASES.

2172. In action to recover forfeiture, where informer joins state as plaintiff and is entitled to portion of recovery (Wisconsin).
2173. Judgment of forfeiture of goods (Wisconsin).
2174. In action for double or treble damages.
2175. Judgment in action in the nature of scire facias.
2176. Outline judgment of perpetual injunction.
2177. Perpetual injunction against construction of a street railroad.
2178. Enjoining shows on Sunday.
2179. Enjoining use of premises as a slaughter-house.
2180. Judgment abating nuisance and for damages, in action at law (Wisconsin).
2181. Enjoining the collection of a judgment.
2181. Enjoining intimidation of employees or picketing by labor organizations.
2183. Order of interpleader and reference in equity.
2184. Setting aside conveyance as fraudulent and giving leave to proceed in execution.
2185. Avoiding sale and voluntary assignment, and directing transfer to receiver.
2186. The same, directing sale by the sheriff.
2187. Provision setting off costs of defendant against the plaintiff's judgment.
2188. Declaring gift void.
2189. Judgment rescinding conveyance by parent to son in consideration of support.
2190. Setting aside deed obtained by fraud.
2191. Judgment for specific performance of land contract against vendor, short form.
2192. The same, another form.
2193. Interlocutory judgment denying specific performance, but retaining action for recovery of damages (Wisconsin).
2194. The same, against purchaser.
2195. Judgment allowing plaintiff to redeem, ordinary form.
2196. Another form, apportioning redemption moneys between several defendants and allowing taxes paid.
2197. Affidavit by defendant, of non-payment of redemption money.
2198. Final order of dismissal because of non-payment of redemption moneys.
2199. Judgment of strict foreclosure against junior incumbrancer who was not a party to original foreclosure action.
2200. Judgment quieting title to lands (Wisconsin).
2201. Judgment in trespass for cutting timber, where defendant claims cutting was by mistake but the jury negative such claim (Wisconsin).
2202. The same, where jury find mistake but the offer of judgment was insufficient (Wisconsin).

2203. The same, where jury find mistake and the offer of judgment was sufficient (Wisconsin).
2204. Judgment for plaintiff in action by tax title claimant to bar original owners (Wisconsin).
2205. Judgment for defendant in action by tax title claimant (Wisconsin).
2206. Judgment in action to foreclose tax certificate (Wisconsin).
2207. Judgment of ouster from office, in quo warranto action brought by rival claimant (Wisconsin).
2208. Judgment in favor of incumbent, in same action.
2209. Judgment ousting individuals from the exercise of usurped corporate powers, in action of quo warranto brought on information of attorney general (Wisconsin).
2210. Judgment ousting public officer and forfeiting his office.
2211. The same, for usurpation of office.
2212. Judgment annulling corporation for violation of its charter (Wisconsin).
2213. Judgment of absolute divorce in wife's favor.
2214. Judgment of divorce with final division of property instead of alimony (Wisconsin).
2215. Judgment of divorce from bed and board.
2216. Interlocutory judgment of limited divorce from bed and board (Wisconsin).
2217. Judgment dismissing appeal from justice court for failure to bring action to trial (Wisconsin).
2218. Judgment affirming or reversing justice's judgment, where there is no new trial (Wisconsin).
2219. Judgment on appeal from justice court after trial de novo (Wisconsin).
2220. Order of restitution on reversal of a justice's judgment which has been collected (Wisconsin).
2221. Judgment on appeal from county court (Wisconsin).
2222. Order dismissing action erroneously certified to circuit court as involving title to land (Wisconsin).
2223. Judgment pursuant to direction of supreme court, after reversal.
2224. Judgment in form against several joint debtors, one only being served (Wisconsin).
2225. Judgment of foreclosure of mechanic's lien (Wisconsin).
2226. Judgment for deficiency on mechanic's lien judgment (Wisconsin).
2227. Interlocutory judgment for accounting in action for dissolution of partnership (Wisconsin).
2228. Final judgment of dissolution of partnership, and closing up proceedings.
2229. Judgment of reformation of a deed on ground of mistake.
2230. Judgment correcting an account stated.
2231. Judgment of contribution between sureties.
2232. Judgment affirming judgment of county court probating will (Wisconsin).
2233. Judgment adopting advisory verdict of jury and reversing judgment of county court refusing probate of will.
2234. Judgment construing will.
2235. Judgment establishing lost will.
2236. Judgment against receiver in his official capacity.
2237. Judgment in action to enforce lien on logs or timber, after jury trial (Wisconsin).

In this chapter various statements of relief suitable for insertion in judgments in special cases are given, which may be added to that particular form of recitals contained in the immediately preceding chapters which appropriately recite the previous proceedings in the cause.

2172. In action to recover forfeiture, where informer joins state as plaintiff and is entitled to portion of recovery (Wis. Stats. 1898 sec. 3302).

[Recite proceedings, verdict, finding or report, etc., as in immediately preceding chapters continuing]:

Now upon motion of G.... H...., attorney for plaintiffs,

IT IS ADJUDGED, that the plaintiffs have and recover of the said defendant the sum of dollars, and that the state of have one moiety [*or other share, according to the statute*] to its own use, and that the said plaintiff [*name informer*] have the remaining moiety [*or other share*] thereof to his own use, according to the statute in such case made and provided.

It is further adjudged that the plaintiffs recover of the defendant the costs of this action taxed at dollars, making in all the sum of dollars, and that if this judgment be not paid the defendant be committed to the county jail of county there to be imprisoned for days [*imprisonment can not exceed six months*] or until otherwise discharged pursuant to law.

2173. Judgment of forfeiture of goods (Wis. Stats. 1898 sec. 3296).

[Title.]

This action having been tried before the court and a jury at the term of the court, 19.., and a verdict having been duly rendered therein on the day of, 19.., by which it is found that the following described personal property, viz. [*describe same*], is forfeited to the state of Wisconsin, the plaintiff herein, and that said plaintiff is entitled to the delivery of said property or the value thereof, and that such value is the sum of dollars; and the court having ordered judgment in accordance with said verdict,

Now upon motion of G.... H...., attorney for said plaintiff,

IT IS ADJUDGED that the said property above described is forfeited to the plaintiff and that said plaintiff have delivery of the same or the value thereof in case a delivery can not be had, to-wit, the sum of dollars, with the costs and disburse-

ments of this action taxed at dollars making in all the sum of dollars.

2174. In action for double or treble damages.

[*Recite proceedings, verdict, etc., as in immediately preceding chapters, continuing*]: therefore;

IT IS ADJUDGED, that the plaintiff recover of said defendant double [*or, treble*] the amount of the damages so as aforesaid found by said jury, together with dollars, his costs of this action, amounting in the whole to dollars.

2175. Judgment in action in the nature of scire facias.

[*Recite proceedings as in immediately preceding chapters, continuing*]:

And it appearing that the action is brought to continue the action mentioned in the complaint herein, in the name of the above-named plaintiff, as executor of, and in lieu and place of M.... N...., deceased, the former plaintiff therein; and, also, to obtain execution, in the name of the plaintiff, of the judgment mentioned in the complaint herein, according to the force, form, and effect thereof, and of the recovery therein, and certain findings of fact and conclusions of law being made by this court; now on motion of O.... P...., for the plaintiff herein:

IT IS ADJUDGED, that the said action mentioned in the complaint herein be continued in the name of the plaintiff, A.... B...., as executor of the said M.... N...., deceased; and that the said A.... B...., as executor as aforesaid, have execution of the aforesaid judgment for the damages and costs aforesaid, and the interest thereon, against the said defendant, with the like effect as if the said M.... N.... had not died, according to the force, form, and effect of the said judgment.

And it is further adjudged, that the plaintiff recover of the said defendant dollars, for his costs and disbursements in this action; and that the plaintiff have execution therefor.

2176. Outline judgment of perpetual injunction.¹

[*Recitals of proceedings, findings or report of referee, etc., as in forms in immediately preceding chapters and continuing*]:

IT IS THEREFORE ORDERED and adjudged that the defendants and each of them, their agents and employees, and all persons claiming under them or acting under the direction or authority of them, or either of them, be and they are hereby per-

¹ For forms of statement of various acts enjoined see Forms 398 to 439, inclusive.

petually enjoined and restrained from [*here state specifically the acts to be restrained*].

[*If damages have been assessed and recovered add judgment for amount so recovered.*]

2177. Perpetual injunction against construction of a street railroad.

[*Recitals of proceedings, trial, finding or report as in forms in immediately preceding chapters*];

IT IS THEREFORE ORDERED and adjudged, that the said defendants [*names*], and each of them, and all persons claiming under them, or acting under the authority and direction of them, or either of them, are hereby perpetually enjoined and restrained from entering into or upon said street, called, for the purpose of laying or establishing a railroad therein, under the grant or resolution of said common council, set forth in the findings in this action.

And it is further ordered and adjudged, that the said defendants, the mayor, and common council of the city of, be, and they hereby are, perpetually enjoined and restrained from granting to any person or persons whomsoever, the exclusive right, liberty, and privilege of laying down or constructing a railroad in said street.

2178. Enjoining shows on Sunday.

[*Recitals as in forms in immediately preceding chapters, continuing*]: therefore:

IT IS ADJUDGED, that the defendants, and their agents and servants, be, and they hereby are, perpetually enjoined from * using the premises mentioned in the complaint, or any part thereof, as a place of public entertainment on Sundays or Sunday evenings.

2179. Enjoining use of premises as a slaughter house.

[*Proceed as in last preceding form to the * continuing*]: using the buildings or any of them situated and standing upon lot 1 of block 1 in the city of as a slaughter house.

2180. Judgment abating nuisance and for damages in action at law (Wis. Stats. 1898 sec. 3181).

[*Title.*]

[*Caption as in Form 7.*]

The issue in this action having been tried before the court and a jury and a verdict rendered finding that the said described in the complaint is, and has since the . . . day of, 19. ., been a nuisance, and the jury having assessed the plaintiff

iff's damages for the maintenance of said nuisance at dollars;

Now on motion of G.... H...., attorney for plaintiff,

IT IS ADJUDGED that the plaintiff, A.... B...., do have and recover of C.... D...., defendant, the sum of dollars, damages, and the sum of dollars, his costs as taxed, and that the plaintiff have execution therefor.

It is further adjudged, that the nuisance described in the said complaint, to-wit [*here describe the same*] be abated and removed, and that a warrant to the sheriff of county, do issue out of this court, under the seal thereof, commanding said sheriff to abate and remove the said nuisance at the expense of said defendant, in the following manner, to-wit [*here specify manner of abatement*] unless within days from service of notice of entry of this judgment the defendant himself abate and remove the same, and that in case such warrant be issued and executed, the said sheriff collect the expense of such abatement and removal of the said defendant in the manner provided by law.

By the Court:

O.... P...., Clerk.

2181. Enjoining the collection of a judgment.

[*Recite proceedings, and verdict, decision, or report, as in forms in immediately preceding chapters, continuing*]: and it appearing that the plaintiffs are entitled to relief in respect to the judgment mentioned in the complaint, on the ground that the recovery of the same was had by fraud on the part of the defendants [*or state ground according to the finding*],

IT IS THEREFORE ADJUDGED, that the defendants, and each of them, and their agents and assigns, be perpetually enjoined from collecting, or in any wise enforcing, said judgment;

And it is further adjudged, that the plaintiffs recover of the defendants dollars costs of this action.

2182. Enjoining intimidation of employees or picketing by labor organizations (*Vegelahn v. Guntner*, 167 Mass. 92).

[*Recitals of trial and findings as in immediately preceding chapters and continuing*]:

IT IS ORDERED, adjudged, and decreed that the defendants, and each and every of them, their agents and servants, be restrained and enjoined from interfering with the plaintiff's business by obstructing or physically interfering with any persons in entering or leaving the plaintiff's premises numbered

..... street in said, or by intimidating, by threats, express or implied, of violence or physical harm to body or property, any person or persons who now are or hereafter may be in the employment of the plaintiff, or desirous of entering the same, from entering or continuing in it, or by in any way hindering, interfering with, or preventing any person or persons who now are in the employment of the plaintiff from continuing therein, so long as they may be bound so to do by lawful contract.

2183. Order of interpleader and reference in equity (sustained by *City Bank v. Bangs*, 2 Paige Ch. 570).²

[Recitals of proceedings as in immediately preceding chapters and continuing] :

IT IS ORDERED and adjudged, that the said complaint [*or*, bill of interpleader] is properly brought by the plaintiffs in this action; that the plaintiffs be paid their costs of this action, to be taxed by deducting the same from out of the fund in the complaint mentioned, and dollars as an additional allowance; and that the plaintiffs thereupon, within thirty days next hereafter, pay into court, and deposit the amount of the residue of said fund, principal and interest to the time of such payment, with the clerk of this court, for the benefit of such of the defendants as shall be found to be entitled thereto; and that the plaintiffs so paying said amount into court, and depositing the same with the clerk of this court, be dismissed from the further prosecution of this action, and thereupon be released, acquitted, and discharged from all claims or liability to either or any of the defendants in this action, for, upon, or by reason of said fund, on the payment thereof into court as aforesaid.

And it is further ordered, adjudged, and decreed, that the said defendants do interplead, settle, and adjust their several claims, demands, and matters in controversy in this action, as between themselves.

And, for that purpose, it is further ordered and adjudged, that it be, and is hereby referred to R.... F...., Esq., counsellor-at-law, of, as sole referee, to hear and determine

² Interpleader is now generally accomplished by application to the court in a pending action under statutory provisions. See Chapter CXXVII of this work. The ancient bill of interpleader in equity is generally superseded by these pro-

visions, and is only to be brought when the statutory relief is not obtainable. *McDonald v. Allen*, 37 Wis. 108. This form is only for use in case of the proper bringing of the equitable action.

the same, fourteen days' notice of such hearing to be first given to the respective defendants, or their attorneys, with power to require said several defendants to present, try, and determine their several and respective claims to said fund in controversy before him, in such manner and under such regulations as he may deem just and proper.

That the said referee, among other things, examine, ascertain, and determine which of said defendants is entitled to the said fund so deposited with the clerk of this court; and if he shall be of the opinion that any one or more of the said defendants is, or are, equitably entitled to have a share in the same, that said referee also ascertain and determine what portion of said fund belongs to each; and that said referee do find, decide, and make report to this court with all convenient speed.

By the Court:

O.... P...., Judge.

2184. Setting aside conveyance as fraudulent and giving leave to proceed in execution.

[Recitals of trial, findings, etc., as in forms in immediately preceding chapters and continuing]:

IT IS ADJUDGED, that the conveyance [*describing it*] dated the day of, 19.., executed by the defendant Y.... Z.... to the defendant W.... X...., was made with intent to defraud the creditors of the said Y.... Z...., and is void as against the plaintiff in this action; and that the judgment confessed by the defendant Y.... Z.... in favor of the defendant U.... V.... in the court, and entered in the office of the clerk of, for dollars, was made with intent to defraud the creditors of said Y.... Z.... [*or, is insufficient, and, in law, fraudulent as against the creditors of said Y.... Z....*]; and that the same, and all the proceedings thereon, the execution, and the sale thereunder, and the sheriff's certificate of sale, bearing date the day of, 19.., and his deed, bearing date the day of, 19.., to the defendant S.... T...., in pursuance thereof, are each and all void as against the plaintiff in this action [and said judgment is ordered to be cancelled and discharged of record by the clerk of this court].

And it is further adjudged, that the plaintiff recover of the defendants [*naming which*] dollars costs of this action.

And it is further adjudged, that the plaintiff in this action is at liberty to proceed upon his execution heretofore issued upon the judgment in his favor mentioned in the complaint, or to issue another execution, as he may be advised; and that the said de-

fendant [*naming him*] deliver to the sheriff upon any such execution said property [*describing the property reached*], to be sold and applied to satisfy said judgment, and interest, and also the costs of this action.

2185. Avoiding sale and voluntary assignment, and directing transfer to receiver.

[*Recitals as in forms in immediately preceding chapters and continuing*]:

IT IS ADJUDGED, that the plaintiffs, by virtue of their judgment and execution, and the commencement of this action, have a lien upon all the property of every description of the said defendants [*debtors*], and all that was assigned or transferred by them to the defendant [*a vendee of certain goods*], or so much thereof as may be necessary to satisfy the plaintiffs' judgment, interest, and costs, which lien took effect on the day of, 19.., when the summons and complaint herein were served; and that the assignment to the defendant [*an assignee for benefit of creditors*], and the sale to the said [*vendee*], in the pleadings mentioned, was made with intent to hinder, delay, and defraud the plaintiffs and other creditors of the said [*debtors*], was and is void as against them.

It is therefore ordered and adjudged, that the sale made by the defendants [*debtors*] to the defendant [*vendee*], and the assignment made by said defendants [*debtors*] to the defendant [*assignee*], be, and they hereby are set aside and declared void; and that the said [*assignee*] do forthwith pay and deliver all the money and other property assigned to him, and the proceeds thereof, to R.... C.... [*receiver heretofore appointed of the property of the said (debtors) and*], who is hereby appointed, receiver in this action, as well of the property belonging to the said [*debtors*] as of that assigned to said [*assignee*], and that sold to said [*vendee*].

And it is further ordered and adjudged, that the defendant [*vendee*] do transfer and deliver all the property sold to him, and the proceeds thereof, to the said receiver.

And it is further ordered and adjudged, that the said receiver do pay to the said plaintiffs the amount of their said judgment, being dollars with interests from the day of, 19.., and dollars, the plaintiffs' costs in this action, out of the said money and property [*or any other money and property received by him as such receiver, or the proceeds thereof, or so much thereof as has not been already disposed of by the order of a competent court, binding upon the said receiver, and having priority over the plaintiffs*].

And it is hereby referred to R.... F...., Esq., counsellor-at-law, of the city of, to examine into the accounts and doings of the said [assignee], while acting or professing to act as assignee under the said assignment, and also to decide upon what sums are properly and what sums are improperly charged, credited, or entered by said defendant [assignee] in his accounts as such assignee, and to adjust and settle the said accounts, and to direct the delivery to said receiver, and the payment to him of any assets or moneys pertaining to said assigned estate yet remaining in the hands of said defendant, or for which he is or ought to be chargeable.

And that said referee do also examine and inquire, so far as is practicable, what disposition has been made of the property sold to the said [vendee], and where the same now is; that he charge the said [vendee] with the sum of dollars, as the price of the said property, and credit him with any portion of the same that he may deliver to the receiver at its value, based upon the estimate that the whole property so sold was worth dollars.

And it is further ordered, that either party be at liberty to apply to this court at any time for further directions upon the foot of this judgment.

2186. The same, directing a sale by the sheriff.

[*After declaring incumbrances, etc., void, as in Form 2185, continue*]:

And it is further adjudged, that the property described in the complaint [or, in said assignment] be sold by the sheriff of county [*proceed with directions as to mode of sale, and direct payment to the plaintiff of the*] net proceeds, or so much thereof as will satisfy the amount of the judgment described in the complaint, being for dollars, with interest from the day of, 19.., and dollars costs of this action. And if there be any surplus remaining after such payment, the sheriff pay the same to the defendant [*debtor*] or his attorney.

2187. Provision setting off costs of defendant against the plaintiff's judgment.

Add to the judgment of dismissal]: And that said costs be, and the same hereby are set off against so much of the plaintiff's judgment mentioned in the complaint for dollars, entered in the office of the clerk of this court, on the day of, 19..

2188. Declaring gift void.

[Title.]

[Caption as in Form 7.]

[Recitals of trial and findings as in forms in immediately preceding chapters, and continuing] :

IT IS ADJUDGED that the instrument [*describing it*] signed by the defendant in the plaintiff's complaint set forth, bearing date the day of, 19.., and purporting to assign [*or convey*] to the plaintiff [*state property covered*] is void, and of no legal force or effect, and that the plaintiff recover of the defendant dollars, costs of this action.

2189. Judgment rescinding conveyance by parent to son in consideration of support.

[Title.]

[Caption as in Form 7.]

[Recitals of trial and findings as in forms in immediately preceding chapters, and continuing] :

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the deed [*or contract, or both, as the case may be*] described in the complaint and recorded [*state place of record if recorded*] be and the same is wholly rescinded and set aside and that the plaintiff be and is hereby declared and adjudged to be the owner in fee simple and entitled to the immediate possession of the premises named in the complaint and described as follows [*insert description*] and that the defendant has no right, title or interest therein.

It is further adjudged that the title to the following personal property named in said deed or contract [*insert description*] be and the same is hereby restored to and vested in the plaintiff, and that the defendant deliver the same to the plaintiff within ten days from the date of service of notice of the entry of this judgment.

[Add judgment for costs.]

By the Court:

R.... S...., Clerk.

2190. Setting aside deed obtained by fraud.

[Title.]

[Caption as in Form 7.]

[Recitals of trial and findings as in forms in immediately preceding chapters, and continuing] :

IT IS THEREFORE ADJUDGED that the deed of conveyance, described in the complaint, purporting to convey [*describe premises*] from the plaintiff to the defendant, be and the same hereby is vacated, set aside and annulled, and declared of no force and effect. And that the plaintiff recover from the defendant his costs in the action, taxed at dollars.

2191. Judgment for specific performance of land contract against vendor, short form.

[Title.]

[Caption as in Form 7.]

[Recite trial and findings as in forms in immediately preceding chapters, and continuing]:

On motion of G.... H...., attorney for plaintiff,

IT IS ADJUDGED that upon payment by the plaintiff to the defendant of the sum of dollars [*balance due on the contract*] the defendant convey the premises described in the complaint, to-wit [*describe premises*], to the plaintiff by a good and sufficient deed, with the usual covenants of warranty [*or by quitclaim deed in the usual form*] and that in default thereof this judgment shall have the same effect and operation as such deed. And that the plaintiff recover from the defendant his costs herein taxed at dollars.

2192. The same, another form.

[Recitals as in last form.]

IT IS ADJUDGED, I. That the agreements set forth in the complaint, and proven in this cause, be specifically performed; and that the defendant [*vendor*] within ten days from the date of service upon him of notice of the entry of this judgment execute and deliver to the plaintiff a good and sufficient conveyance in fee, with the usual covenants of warranty [*or a good and sufficient deed of quitclaim in the usual form, according to the agreement*] of the following described premises [*description*]. *

II. It is further adjudged, that the plaintiff upon the delivery or tender of said conveyance do pay to the defendant or his attorney, ... dollars, the residue of the purchase-money named in the contract set forth in the complaint, with interest from the day of, 19.., less however the sum of dollars being the amount of the deduction and abatement to which the plaintiff is hereby adjudged to be entitled, for the deficiency in the amount of the land agreed to be conveyed.

III. It is further adjudged, that if the plaintiff upon a tender of said conveyance refuse to pay the sum so found due, the plaintiff be forever barred of his right to a specific performance of said contract; and that the contract be given up to be cancelled.

IV. It is further adjudged, that the plaintiff recover of the defendant dollars costs of this action, and may have execution therefor, and for the amount of purchase-money after deducting the abatement, to-wit, the sum of dollars, with interest, adjudged due as aforesaid.

2193. Interlocutory judgment denying specific performance but retaining action for recovery of damages (see *Cole v. Getzinger*, 96 Wis. 559).

[*Title.*]

[*Caption as in Form 7.*]

[*Recitals as in Form 2191.*]

IT IS ADJUDGED that specific performance of the contract set forth in the complaint be and the same hereby is denied, but that this action be retained to allow the plaintiff to establish his claim for damages suffered by reason of the defendant's breach of said contract.

It is further adjudged that if within thirty days from the date of the entry of this judgment the plaintiff elect in writing, to be filed with the clerk of this court, to proceed in this action to recover said damages, he be allowed so to proceed, but that in case of failure so to elect final judgment shall be entered upon notice to the plaintiff dismissing the complaint upon the merits.

By the Court:

R.... S...., Clerk.

2194. The same, against purchaser.

[*As in Form 2192 to the *, substituting "plaintiff" for "defendant," and "defendant" for "plaintiff," and continuing*]:

II. And it is further adjudged, that if the defendant refuse to receive said deed, the plaintiff file the same with the clerk of this court; and that upon such delivery or filing of said conveyance, the defendant pay to the plaintiff or his attorney dollars, the residue of the purchase-money named in the contract, set forth in the complaint, with interest from the day of, 19..

[*Abatement of purchase price may be provided for as in preceding form. If plaintiff has collected rents and profits which should be allowed to defendant and the amount thereof has not been fixed by the findings or ascertained upon the trial a clause may be inserted ordering a reference and directing the referee "to take an account of the rents and profits of the above-described premises which may have come to the hands of the plaintiff, or any person for his use, and to make all just deductions therefrom, and what shall be found upon such account to be justly allowable to the defendant, shall be deducted from the amount found due for principal and interest of said purchase-money." Where such an account is decreed, the judgment should not be made final until after report.*]

2195. Judgment allowing plaintiff to redeem, ordinary form.

[Title.]

[Caption as in Form 7.]

[Recitals as in forms in immediately preceding chapters, and continuing]:

IT IS ADJUDGED, that the plaintiff pay unto the said defendant dollars, the amount which is so found and reported due to him, for principal and interest as aforesaid with dollars for the said value of his improvements, and with dollars costs, hereby adjudged to the plaintiff, within six months after the entry of this judgment, and service of notice thereof [with interest thereon from the date of the above-mentioned report, until the time of such payment], at [specifying place and hours for paying]; and that the said defendant do resurrender the said mortgaged premises unto the said plaintiff, or unto such person or persons as he shall direct, free and clear of all incumbrances, done or suffered by him, or any person claiming by, from, or under him, and deliver unto the said plaintiff, on oath, under the direction of the court if the parties cannot agree in respect thereto, all deeds and writings in his custody or power, relating to the said mortgaged premises. But in default of the said plaintiff's paying unto the said defendant what is so reported to be due to him for principal, interest [improvements] and costs as aforesaid, it is ordered, that this action do from thenceforth stand dismissed out of this court, with costs.

2196. Another form, apportioning redemption moneys between several defendants and allowing taxes paid.

[Title.]

[Caption as in Form 7.]

[Recitals as in forms in immediately preceding chapters, and continuing]:

IT IS ADJUDGED that the plaintiffs are entitled to redeem, from the mortgage mentioned and described in the complaint in this action, all and singular the lands and premises hereinafter mentioned and described, and are entitled to have and receive from the defendants [naming which], good and valid deed of conveyance, with the usual covenants of warranty [or otherwise specify the character of the deed to be given according to the terms of the contract] of the mortgaged premises now possessed by them respectively, upon payment to them, in the proportions hereinafter mentioned, of the amount due for principal and interest upon the said bonds and mortgage mentioned in the complaint; and also all sums paid by them respectively for taxes and assessments [with interest thereon] upon the said premises; and that the plaintiff, A.... B...., is entitled so to

redeem the lot designated in the complaint, by the number now held by the defendant, W.... X....; and that the plaintiff, C.... D...., is entitled so to redeem the lot designated in the complaint by the number now held by the defendant, Y.... Z....

And it is further adjudged and decreed, that the amount due for principal and interest upon the mortgage mentioned in the complaint, and from which redemption is sought, amounted, on the day of, 19.., to the sum of dollars.

That the just and proper proportion thereof which the defendant W.... X.... is entitled to receive for the redemption of the lot now held by him, is dollars, with interest from the day last mentioned.

That the just and proper proportion thereof which the defendant Y.... Z.... is entitled to receive for the redemption of the lot now held by him, is dollars, with interest from said last mentioned day.

And it is further adjudged and decreed, that the amount paid for taxes and assessments upon the lots possessed and claimed by the several defendants aforesaid to be owned by them respectively, with interest thereon from the dates of payment thereof to the said last mentioned day, are as follows: that is to say, by the defendant W.... X...., ... dollars; by the defendant Y.... Z...., ... dollars; and that the said defendants are also respectively entitled to have and receive from the plaintiffs upon such redemption, the said last mentioned sums, with interest thereon from the said last mentioned day.

And it is further ordered, adjudged, and decreed, that A.... B...., one of the plaintiffs, is entitled to redeem, and to have and receive from the defendant, W.... X...., a deed of conveyance as aforesaid, of the lot mentioned and described in the complaint by the number, upon the payment by him to the said W.... X.... of the sum of dollars, with interest thereon from the said day of, 19..; and that the said plaintiff, C.... D...., is entitled to redeem, and to have and receive from the defendant Y.... Z...., a deed of conveyance of the lot mentioned and described in the complaint by the number, upon the payment by him to the said Y.... Z.... of the sum of dollars, with interest thereon from the said day of, 19..

And it is further ordered, adjudged, and decreed, that upon payment to the said defendants respectively of the several sums above mentioned, they do forthwith execute and deliver to the said plaintiffs respectively a deed of conveyance, with the usual covenants of warranty except as to taxes and assessments not

paid by them, and not included in the report of the referee on the said several lots so held by them, and thereupon deliver the possession thereof to the plaintiff so redeeming the same.

And it is further ordered, adjudged, and decreed, that the plaintiffs do respectively, within ninety days from the date hereof, pay the said several sums and interest to the said defendants respectively. And that in default of such payment within the time aforesaid, the plaintiffs, and each of them be forever barred of and from all equity of redemption in the premises not so redeemed, and on and from all right, title, interest, claim, or demand in law or equity, in or to the said premises, and every part thereof.

And it is further adjudged, that the defendants, S.... T.... and U.... V...., have now no right, title, or interest in the premises sought to be redeemed, or in the redemption money, and that as to them the complaint in this action be dismissed, without costs.

And it is further ordered, adjudged, and decreed, that the plaintiffs have and recover of the defendants W.... X.... and Y.... Z.... their costs in this action taxed at dollars.

2197. Affidavit by defendant of non-payment of redemption money.

[*Title.*]

[*Venue.*]

Y.... Z...., the above defendant, being duly sworn, says that he has not, nor has any other person or persons on his behalf, at any time heretofore received or been paid the sum of dollars, or any part thereof, which by the judgment made in this cause, on the day of, 19.. [and the referee's report dated, 19.., made in this cause pursuant to the said judgment], was ordered and appointed to be paid to this deponent; but that the said sum of dollars, with interest, now remains due and owing to this deponent upon the mortgage in the said judgment mentioned.

Y.... Z....

[*Jurat.*]

2198. Final order of dismissal because of non-payment of redemption moneys.

[*Title.*]

[*Caption as in Form 7.*]

Upon the judgment in this cause, entered on the day of, 19.., and on reading and filing due proof of service upon the said plaintiff more than six months since, of notice of the entry of the same; and on reading and filing the affidavit

of the said defendant, showing that the amount thereby required to be paid, has not been paid; but that the whole of the said sum of dollars still remains due and owing from the plaintiff to the said defendant for his principal, interest, and costs; on motion of J.... K.... of counsel for the defendant, and on hearing of G.... H...., of counsel for the plaintiff, in opposition,

IT IS ORDERED and adjudged, that this action be, and hereby is dismissed, with dollars costs of motion, to be paid by plaintiff to defendant's attorney.

2199. Judgment of strict foreclosure against junior incumbrancer who was not a party to original foreclosure action.³

[Title.]

[Caption as in Form 7.]

[After recitals showing trial of the action and the making of findings, which findings should show the fact of the prior mortgage and the previous foreclosure thereof to which the defendant was not a party, and the sale thereunder to the plaintiff, and that the purchase money was insufficient to pay the said prior mortgage, continue]:

IT IS ADJUDGED that the defendant pay to the plaintiff the sum of dollars, with interest from, 19.., at per cent. and the costs of this action taxed at dollars within [six] months from the date of service upon him of notice of the entry of this judgment, and that if said payment is made, said plaintiff convey said premises by a good and sufficient deed of quitclaim to the defendant. But in default of the payment of said principal, interest and costs within the time limited for that purpose, then said defendant and all persons claiming through or under him shall be forever barred and foreclosed of the equity of redemption and all rights or claims in and to said mortgaged premises.

The said premises are particularly described as follows [*describe same*].

³ The judgment of strict foreclosure of a mortgage as against the mortgagor has been practically abolished in most of the states by the statutes requiring sale of the premises. It is permitted, however, in some jurisdictions, as against judgment creditors or junior lien holders, especially if one foreclosure action

against the mortgagor has already been brought to which the junior lien holder was not a party, and it appears that the mortgaged premises are of less value than the amount of the first lien. *Shaw v. Heisey*, 48 Iowa 468; *Miles v. Stehley*, 22 Neb. 740, s.c. 36 N. W. 142.

2200. Judgment quieting title to lands (Wis. Stats. 1898 sec. 3186).

[Title.]

[Caption as in Form 7.]

[Recitals showing trial of action and findings, and filing of notice of pendency of action as in forms in immediately preceding chapters, and continuing] :

IT IS ADJUDGED that the plaintiff was, at the time of the commencement of this action, and now is, the owner in fee simple absolute of the premises hereinafter described, and his right and interest in said premises as such owner in fee simple is hereby declared and established.

It is further adjudged that the defendant, C.... D...., and all persons claiming under him subsequent to the filing of the notice of the pendency of this action to-wit, 19.., be and they are hereby, forever barred from any and all claim of right or title to the said premises or lien thereon, or any part thereof.

[That within thirty days after notice of the entry of this judgment the defendant execute and deliver to the plaintiff, under his hand and seal, and duly witnessed and acknowledged, a release to the plaintiff of all claim in and to said premises.]⁴

That the plaintiff do have and recover of the defendant his costs and disbursements herein taxed at dollars.

The following is a description of the lands affected by this judgment [*describe same*].

By the Court:

O.... P...., Clerk.

2201. Judgment in trespass for cutting timber, where defendant claims cutting was by mistake, but the jury negative such claim (Wis. Stats. 1898 sec. 4269; Laws of 1901 c. 170).

[Title.]

[Caption as in Form 7.]

The issues arising in this action having been tried by the court and a jury, and the jury having returned their verdict in which they find [*here recite verdict*], and it appearing from said verdict that such cutting was not done by mistake,

Now on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the plaintiff do have and recover of the defendant C.... D.... the sum of dollars [*highest market value of logs or lumber manufactured therefrom while*

⁴ This clause though sometimes used is not essential as the judgment will sufficiently cut off defendant's claims.

in defendant's possession with interest] together with the costs of this action, taxed at dollars [see sec. 2922 Wis. Stats. 1898] amounting in all to the sum of dollars.

By the Court:

O.... P...., Clerk.

2202. The same, where jury find mistake but the offer of judgment was insufficient (Wis. Stats. 1898 sec. 4269; Laws of 1901 c. 170).

[*Recitals as in last form including the verdict and continuing*]: and it appearing from said verdict that such cutting was done by mistake but that the true value of the said logs and timber when cut together with interest thereon from the time of the cutting to the time of the defendant's offer of judgment and ten per cent damages amounts in the aggregate to dollars, which sum is greater than the amount of the defendant's offer of judgment herein,

On motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED, that the plaintiff, A.... B...., do have and recover of C.... D...., defendant, the sum of dollars, the same being the value of such logs and timber when cut, as found by the jury, and interest thereon from the time of such cutting, and ten per centum as damages on said combined sum of interest and principal, together with the costs of this action * taxed, at the sum of dollars [see sec. 2922 Wis. Stats. 1898], in all the sum of dollars:

By the Court:

O.... P...., Clerk.

2203. The same, where jury find mistake and the offer of judgment was sufficient (Wis. Stats. 1898 sec. 4269; Laws of 1901 c. 170).

[*Recitals as in last form, except that the true value of the timber, with interest and damages, is less than the offer of judgment and continuing*]:

Now, on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED, that the plaintiff, A.... B...., do have and recover of the defendant C.... D...., the sum of dollars, being the amount so offered, less the sum of dollars taxed herein, as the costs and disbursements of the defendant in this action since the date of such offer.

By the Court:

O.... P...., Clerk.

2204. Judgment for plaintiff in action by tax title claimant to bar original owners (Wis. Stats. 1898 secs. 1197-1206).

[Title.]

[Caption as in Form 7.]

[Recitals of service and default or trial and findings, and filing of *lis pendens*, as in forms in immediately preceding chapters and continuing]:

On motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED, that the above named defendants and all persons claiming under them or any or either of them, after the filing of the said notice of the pendency of this action, be and they are hereby forever barred from all right, title and interest in those certain lands described as follows [*insert description*].

It is further adjudged, that the plaintiff do have and recover of the defendant his costs and disbursements herein taxed at dollars.

2205. Judgment for defendant in action by tax title claimant (Wis. Stats. 1898 sec. 1207).

[Title.]

[Caption as in Form 7.]

[Recitals as in last preceding form.]

On motion of G.... H...., attorney for defendant,

IT IS ADJUDGED, that the plaintiff, within thirty days from the date of entry of this judgment, by instrument in writing duly acknowledged and witnessed, release to the defendant all the plaintiff's right, title or claim at the time of the commencement of this action by virtue of any sale or deed, made for the non-payment of taxes, to the following described lands [*insert description*], and that in default of such release this judgment may be recorded with like effect.

It is further adjudged that the defendant recover of the plaintiff his costs and disbursements taxed at dollars and that the money deposited by the defendant upon answering herein be applied in payment thereof and the surplus thereof, if any, paid to the plaintiff.

2206. Judgment in action to foreclose tax certificate (Wis. Stats. 1898 sec. 1181 as amended by Laws 1899 c. 337).

[Title.]

[Caption as in Form 7.]

[Recitals as in last form.]

Now, on motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED: 1. That there is due the plaintiff upon the tax certificates described in the complaint the sum of dollars for principal and interest.

2. That the lands named in said certificates and described as follows, or so much thereof as may be sufficient to satisfy the sum above adjudged, with interest and costs, as well as the subsequent tax liens thereon and all sums necessarily paid by the plaintiff to remove liens upon said lands in order to save the lien of his certificates, to-wit, the sum of dollars, and which may be sold separately without material injury to the interest of the parties, be sold by or under the direction of the sheriff of county, in like manner and upon like notice as in case of sale upon mortgage foreclosure.

3. [*Follow judgment of mortgage foreclosure forms, chapter CXLV.*]

By the Court:

R.... S...., Clerk.

2207. Judgment of ouster from office, in quo warranto action brought by rival claimant (Wis. Stats. 1898 sec. 3463).

[*Title.*]

[*Caption as in Form 7.*]

[*Recite trial verdict or findings as in forms in immediately preceding chapters, and continue*]:

IT IS ADJUDGED that the defendant, C.... D...., * has no right to the said office of [*name office*], and that he be ousted and excluded therefrom.

That the plaintiff [*or relator*], A.... B...., is, and has been since the day of, 19.., entitled to the said office, by virtue of the election alleged in the complaint, and to the franchises, privileges and emoluments thereof, and that he have and recover of the defendant C.... D.... the sum of dollars, his costs of this action.

It is further adjudged that the said defendant be fined the sum of [one thousand] dollars, which, when collected, shall be paid into the treasury of the state, in the manner provided by law [*Wis. Stats. 1898 sec. 3475.*]

By the Court:

O.... P...., Clerk.

2208. Judgment in favor of incumbent, in same action.

[*As in last form to the *, and continuing*] has not intruded into or usurped the office of [*name office*], but that under and by virtue of the [appointment] in the complaint mentioned, is entitled to hold such office and perform the duties thereof, until the day of, 19..

2209. Judgment ousting individuals from the exercise of usurped corporate powers, in action of quo warranto brought on information of attorney general (Wis. Stats. 1898 sec. 3466).

[Recitals of trial, verdict, findings, etc., as in forms in preceding chapters, and continuing] :

IT IS THEREFORE ADJUDGED, that the said defendants, having acted within this state as a corporation under the name of the company without being duly incorporated, be and they are hereby ousted and excluded from all corporate rights, privileges and franchises, under said corporate name so claimed and exercised by them.

[Add judgment for costs.]

2210. Judgment ousting public officer and forfeiting his office.

[Recitals as in last preceding form] :

IT IS THEREFORE ADJUDGED and decreed that the said C.... D.... has, by reason of his acts set forth in the information and findings herein, forfeited his said office of *[name office]*, and that the said defendant C.... D.... be, and he hereby is, ousted and excluded from said office.

2211. The same, for usurpation of office.

[Recitals as in last preceding forms] :

IT IS THEREFORE ADJUDGED that the defendant C.... D.... has usurped and unlawfully holds the office of *[name office]* and that he be and hereby is ousted and excluded therefrom.

2212. Judgment annulling corporation for violation of its charter (Wis. Stats. 1898 secs. 3241-3245).

[Recitals of commencement of action, trial and findings, according to the facts, as in forms in last preceding chapter, and continuing] :

Now, therefore, on motion of E.... F...., attorney general of the state of Wisconsin;

IT IS ADJUDGED and decreed that said defendant corporation has offended against the provisions of law under which it was created *[or, has violated the provisions of section, naming section; or otherwise state one of the causes of forfeiture specified in section 3241 Wis. Stats. 1898, according to the fact]*, as determined in the findings of fact in this action whereby the said defendant has forfeited *[or, surrendered]* its charter and its corporate rights, privileges and franchises; and

It is further adjudged that the said defendant has forfeited

[*or, surrendered*] its corporate rights, privileges and franchises, and that said corporation be and is hereby excluded from such corporate rights, privileges and franchises and that said corporation be, and the same is hereby, dissolved, and that the said defendant, its directors, officers, attorneys and agents be, and they are hereby, enjoined and restrained from exercising any of such corporate rights, privileges or franchises, and from collecting or receiving any debts or demands due or owing to said defendant, and from paying out, interfering with, transferring or selling any moneys, securities, property or effects of the said corporation or held by it.

It is further adjudged that R.... C...., Esq., of be, and he is hereby, appointed receiver of all the property, real and personal, credits, moneys, things in action and effects of said corporation either owned or held by it or in which it is in any way interested, with the usual powers, rights and duties of receivers in such cases, according to the practice of this court and the statutes in such case made and provided.

It is further adjudged that said receiver, before entering on the duties of his trust, give bond to the clerk of this court for the faithful performance of his duties as such receiver in the sum of dollars [*provide number of sureties and manner of approval*], upon the approval of which bond said receiver is authorized and directed to take possession of and sell all the said property of said corporation and convert the same into money and distribute the proceeds thereof after paying the costs and expenses in the following order [*name order of payment as in section 3245 Wis. Stats. 1898*].

It is further adjudged that said receiver may make such further application to this court, from time to time as may be necessary and proper, for further directions and instructions as to the management of his said trust.

It is further adjudged that the plaintiff recover of the said defendant the costs of this action, taxed at dollars, and that said receiver pay said sum to the plaintiff's attorney out of the funds received by him.

By the Court:

R.... S...., Clerk.

2213. Judgment of absolute divorce in wife's favor.

[*Recitals of trial and findings as in forms in immediately preceding chapters, and continuing*]:

IT IS ADJUDGED:

I. That the bonds of matrimony heretofore existing between the plaintiff, A.... B...., and the defendant, C.... D....

B...., be, and the same are hereby wholly dissolved, and the parties freed from the obligations thereof.

II. That the plaintiff's name be changed to [*maiden name*], by which name she was known and called prior to entering into the marriage hereby dissolved.

III. That the said defendant, C.... D.... B...., pay to the plaintiff, A.... B...., the sum of dollars a year, as a suitable allowance for her support; and that the same be paid in manner following [*specify times and place of payment*], during the natural life of the plaintiff, and that said payments be charged as a lien upon the following described real estate of the defendant, to-wit [*describe it*] [*or if the payment of the alimony is to be secured by bond here specify the bond to be given and by whom approved*].

IV. That the custody of the infant children of the parties [*name them*] be, and is hereby awarded to the plaintiff [*with leave to defendant to see and visit them, as follows, specify particularly when and under what conditions defendant may visit them*].

V. That the defendant pay to the plaintiff as a suitable allowance for the support, maintenance and education of said children, the following sums [*specify amounts to be paid and when*].

VI. That the plaintiff have and recover her costs herein, taxed at dollars, in addition to sums heretofore ordered to be paid.

By the Court:

O.... P...., Clerk.

2214. Judgment of divorce with final division of property instead of alimony (Wis. Stats. 1898 sec. 2364).

[*Insert in place of paragraph III in preceding form, the following*]:

III. That a final division and distribution of the estate, real and personal, of the said defendant [and so much of the estate of the plaintiff as has been derived from the defendant] be and is hereby made between the parties as follows: The following described real estate of the defendant, to-wit [*describe same*] is awarded to the plaintiff, and the title in fee thereof is hereby divested from the defendant and transferred to the plaintiff absolutely; and the following described personal property of the defendant is awarded to the plaintiff, to-wit [*describe same*], and the title thereto is hereby transferred from the defendant to the plaintiff absolutely; and the title to the remaining property of the defendant, real and personal, is hereby vested abso-

lutely in said defendant free from all claim of the plaintiff thereon of any nature.

2215. Judgment of divorce from bed and board.

[Recitals as in Form 2213, and continuing] :

IT IS THEREFORE ADJUDGED that the plaintiff and defendant be, and they are hereby, separated and divorced from bed and board forever [*or, for the term of . . . years from this date*].

[Add provisions for alimony, custody of children, etc., as in preceding forms.]

2216. Interlocutory judgment of limited divorce from bed and board (sustained in *Lamberton v. Lamberton*, 125 Wis. 616, under Wis. Stats. 1898 sec. 2883).

[Recitals of trial and findings as in immediately preceding chapters, and continuing] :

Now, therefore, on motion of the attorneys for the plaintiff,

IT IS ORDERED, adjudged and decreed, that the plaintiff be, and she hereby is granted a divorce from bed and board for the term and period of two years from and after this date as against said defendant, and he, the defendant, is restrained and enjoined from attempting hereafter, during said period, to make his home with, or in any manner interfering with, the plaintiff, excepting only that he shall have the right to visit his infant children twice in each month during the day time at the home of said plaintiff if they make their home with her; this judgment not in any manner to prejudice the right of the plaintiff to apply for judgment of divorce from the bonds of matrimony, or from bed and board forever, in the event that the defendant does not refrain from the use of strong and intoxicating liquors and drinks.

Further ordered and adjudged that in and by way of distribution and division of the property and estate of the defendant between the parties hereto, the defendant C.... D.... B.... be, and he hereby is, directed and required to make, execute and deliver to the plaintiff A.... B.... a deed of conveyance of all of his right, title and interest of, in and to those certain pieces or parcels of land described as follows, to-wit [*insert description*].

Further ordered and adjudged that in such division and distribution the plaintiff have, and is hereby awarded, the right to the possession, use and income, for the term and period of five years from and after this date, of the homestead farm lying, being and situate in the town of , county of , and state of , known and described as follows, to-wit [*insert*

[*description*], together with the right to the possession and use of all the personal property thereon belonging to the defendant, excepting only such articles of household furniture within the home on said farm as was given to said defendant by, or which came to him from, his relatives, all of which said furniture he shall have the right to remove from said home if he sees fit to do so; provided, however, that the plaintiff shall pay all taxes assessed against said farm and personal property, and shall care for said real estate and keep cut all noxious weeds thereon.

Further ordered and adjudged that the defendant C.... D.... B.... have the possession, use and income of all the remainder and residue of his property, and that the judgment herein shall not be deemed to provide for or to be a final distribution and division of the property of the defendant between the parties hereto.

Further ordered and adjudged that the custody and control of the infant children of the parties hereto be, and it hereby is, awarded to the plaintiff herein, and that the said plaintiff be and she hereby is required to care for and maintain said infant children out of the property and estate hereby awarded to her.

Further ordered and adjudged that costs be not awarded to either of the parties hereto.

Dated, 19..

By the Court:

R.... S...., Clerk.

2217. Judgment dismissing appeal from justice court for failure to bring action to trial (Wis. Stats. secs. 3766, 2925).

[*Title.*]

[*Caption as in Form 7.*]

The return upon the appeal herein having been filed on the day of, 19.., and said appeal not having been brought to a hearing before the end of the second term of this court thereafter,

Now, on motion of G.... H.... attorney for [*name respondent*],

IT IS ADJUDGED, that said appeal be and is hereby dismissed, and that said [*name respondent*] do have and recover of [*name appellant and his sureties on the appeal*] the costs and disbursements upon said appeal, taxed at dollars.

2218. Judgment affirming or reversing justice's judgment, where there is no new trial (Wis. Stats. 1898 sec. 3769).

[*Title.*]

[*Caption as in Form 7.*]

The appeal herein having been brought to a hearing before the court upon the return herein, after hearing G.... H....

attorney for the appellant and J.... K.... attorney for the respondent, the court being now fully advised in the premises,

Upon motion of attorney for,

IT IS ADJUDGED that the judgment of the justice in this action, adjudging that the said recover of the said the sum of dollars damages and costs [*or otherwise describe briefly the judgment appealed from, according to the fact*], be and the same is hereby affirmed [*or, reversed*] in whole [*or, reversed in part, to-wit, here state what part is reversed*].

And it is further adjudged that said do have and recover of the said and [*name sureties on appeal bond*], the costs and disbursements of this appeal, taxed at dollars.

2219. Judgment on appeal from justice court after trial de novo (Wis. Stats. 1898 sec. 3768).

[*Title.*]

[*Caption as in Form 7.*]

This action, being an appeal from a judgment rendered by and before L.... M...., Esq., a justice of the peace of said county, having been tried * before the court and a jury, and a verdict having been duly rendered for the plaintiff and his damages assessed at the sum of dollars [*or, for the defendant*] [*or, if the trial was by the court, insert after the * by the court, trial by jury having been waived*, and the court having made and filed findings of fact and conclusions of law wherein judgment is ordered for the plaintiff for dollars damages and costs, *or for the defendant*];

Now, on motion of attorney for,

IT IS ADJUDGED that the plaintiff A.... B.... have and recover of C.... D.... the defendant and E.... F.... [*surety on appeal bond*] the said sum of dollars damages, and his costs and disbursements, taxed at dollars, making in all the sum of dollars [*or, that the defendant C.... D.... have judgment dismissing the complaint and recover of A.... B...., the plaintiff, his costs and disbursements, taxed at dollars*].

2220. Order of restitution on reversal of a justice's judgment which has been collected (Wis. Stats. 1898 sec. 3772).

[*Title.*]

[*Caption as in Form 7.*]

This action having been tried upon the appeal herein and judgment rendered wholly reversing the judgment theretofore rendered therein by L.... M...., Esq., justice of the peace, and motion having been made, upon the record and the affidavit

of C.... D...., for an order of restitution, and it appearing satisfactorily that the plaintiff before the rendition of said judgment of reversal and on the day of, 19.., had collected the whole [*or some part, naming the amount collected*] of said justice's judgment, and that the said C.... D.... is entitled to restitution of the sum so collected;

Now, on motion of G.... H...., Esq., attorney for the defendant,

IT IS ORDERED, that the said A.... B.... restore to the said C.... D.... the said sum of dollars, with interest from the said day of, 19.., [*day of collection*], amounting in all to dollars, and that if the said sum be not paid the said C.... D.... have execution therefor. It is further ordered that said A.... B.... pay to the said C.... D.... the sum of dollars, costs of said motion.

2221. Judgment on appeal from county court (Wis. Stats. 1898 sec. 4037).

[*Title.*]

[*Caption as in Form 7.*]

The appeal of [*name appellant*] from the order [*or, judgment*] of the county court of county, coming on to be heard at said term, and the issues therein having been tried by the court, * and the judge having made and filed his findings of fact and conclusions of law on the day of, 19.., wherein judgment is ordered as hereinafter adjudged [*or if trial was by jury insert after the * and a jury and a verdict having been duly rendered finding for, insert substance of verdict*];

Now, on motion of G.... H...., Esq., attorney for,

IT IS ADJUDGED, that the judgment [*or, order*] of the county court of county dated, 19.., from which this appeal was taken, be and the same is wholly affirmed [*or, wholly reversed*].

[*Or if affirmed in part and reversed in part*]:

IT IS ADJUDGED that so much of the judgment of the county court of county, from which this appeal is taken, as provides [*here state specifically part reversed*] be and the same is hereby reversed, and that the remainder of said judgment be and is hereby affirmed; and that the said do have and recover of the said his costs and disbursements herein, taxed at dollars.

And it is further adjudged that this case be remitted to the county court aforesaid with directions to [*here state further proceedings to be taken in the county court, if further proceedings are necessary*].

2222. Order dismissing action erroneously certified to circuit court as involving title to land (Wis. Stats. 1898 secs. 3621, 3622).

[*Title.*]

[*Caption as in Form 7.*]

A transcript of the docket entries in this action, together with all process and other papers therein, having been certified and returned to this court by L.... M...., Esq., a justice of the peace of said county, before whom the said action was commenced, and the said justice having certified that by the answers therein the title to lands will come in question, and it appearing from the papers so certified that no question of title to land has been raised in the said action, and that the same was so certified to this court erroneously; and that this court therefore has not jurisdiction of the same;

Now on motion of G.... H...., attorney for the defendant,

IT IS ORDERED that the action be and the same is hereby dismissed without costs.

2223. Judgment pursuant to direction of supreme court after reversal.

[*Title.*]

[*Caption as in Form 7.*]

This action having been tried at the term, 19.., of this court, before the court * and a jury, and a special verdict having been rendered therein which is of record [*or if tried by the court insert after **, and the court having made findings of fact and conclusions of law therein which are of record] and the court having on the day of, 19.., rendered judgment thereon for the plaintiff and against the defendant for dollars damages and dollars cost; and the defendant having duly appealed from said judgment, and the whole thereof, to the supreme court; by which court the said judgment was, on the day of, 19.., wholly reversed; and the record in this cause having been duly remitted from said supreme court to this court with directions that judgment be entered in favor of the defendant; and due notice of such remittance having been given to the plaintiff, as appears by the proofs on file; and due notice of application for this judgment having been given, and proof of such notice having been filed,

Now, on motion of G.... H...., attorney for the defendant,

IT IS ADJUDGED that the complaint herein be dismissed and that C.... D...., defendant, do have and recover of A.... B...., plaintiff, the costs and disbursements of this action, taxed at the sum of dollars.

2224. Judgment in form against several joint debtors, one only being served (Wis. Stats. 1898 sec. 2884).

[Title.]

[Caption as in Form 7.]

The summons and complaint in this action having been personally served upon the defendant, C.... D...., on the day of, 19.., and due proof of such personal service having been made and filed, and it appearing by proofs duly made that after due diligence the defendant, E.... F...., can not be found, and has not been served;

And said action having come on for trial upon the answer of the defendant, C.... D...., alone, and having been tried by the court, trial by jury having been waived, and the court having made and filed its findings herein which are of record and having concluded that the defendants are jointly indebted to the plaintiff herein, and that judgment should be entered in form against all said defendants,

Now, on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the said A.... B...., plaintiff, do have and recover of the said defendants, C.... D.... and E.... F...., the sum of dollars, damages, and dollars, costs, making in all the sum of dollars; this judgment to be enforced only against the joint property of said C.... D.... and E.... F.... and the separate property of said C.... D....

2225. Judgment of foreclosure of mechanic's lien (Wis. Stats. 1898 sec. 3224).

[Title.]

[Caption as in Form 7.]

[Recite trial verdict or findings as in immediately preceding chapters, and continue]: and due notice of the pendency of this action having been filed in the office of the register of deeds of the county of

Now, on motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED: 1. That the amount due the plaintiff A.... B.... from the defendant [name defendant or defendants who are personally liable to the plaintiff] is the sum of dollars, and interest thereon from the day of, 19.., amounting to the sum of dollars and cents.

2. That the amount due the plaintiff [name another plaintiff who has established a separate lien] from the defendant [name defendants personally liable] is the sum of dollars, and interest thereon from the day of, 19.., amounting to the sum of dollars and cents. [If there are defendants who have established liens adjudge the amount due each in the same way.]

3. That all said sums are due for work and labor performed and for materials furnished upon, in and about the construction of a certain building, to-wit [*name or describe building*], on the following described premises, to-wit [*describe same*], being less than one acre in extent and situate within the limits of an incorporated city, to-wit, the city of in said county [*or if the premises are not within a city or village specify the fact*]; and that said premises and the interest of the defendant, C.... D...., therein, at the time of the commencement of the work and furnishing of the materials aforesaid, to-wit, the day of, 19.., or which he has since acquired therein, are subject to a lien for each and all of said sums under the provisions of chapter 143 of the revised statutes of this state, and the acts amendatory thereof, and—

4. That the said interest of said C.... D.... in and to the said building and premises above described be sold to satisfy the amount of the said several liens above specified, including the costs of this action and the costs of filing the claims for said liens.

5. That such sale be made by the sheriff of the county of [*or, by L.... M.... as referee hereby appointed for that purpose*]; that the said sheriff [*or, referee*] give notice thereof in the manner provided by law; that said premises be sold in one parcel [*or if in parcels in parcels as follows, describe parcels*]; that out of the proceeds of such sale or sales the sheriff [*or, referee*] [*after confirmation of such sale*] pay to G.... H...., plaintiff's attorney, the sum of dollars, and interest thereon to the time of such sale, being the costs of this action; that he also pay to A.... B...., plaintiff, or his attorney, the sum of dollars, the amount due him as herein adjudged, and dollars, his costs of filing his claim for lien, with interest on said sums to the date of sale [*insert same directions as to other lien claimants*]; that said sheriff [*or, referee*] make report of such sale within ten days after making the same, and file the same with the clerk of this court; and bring the residue of the proceeds of such sale into court, with the report of sale, to abide the order of the court.

6. That if the proceeds realized from said sale shall be insufficient after paying the costs of the action and of making sale, to pay the full amount adjudged to be due to said claimants as above adjudged and directed, that then the said sheriff [*or, referee*] pay and distribute the proceeds of such sale applicable thereto, to each of said claimants in the proportion which the sum adjudged to each bears to the whole amount adjudged to all.

7. That, if any deficiency arise upon such sale, in the pay-

ment of said sums so adjudged to be due, the said sheriff specify the same in his report of sale, and that judgment may be rendered therefor, upon the confirmation of such sale, against the defendant [*name defendant or defendants who are personally liable*], and that the purchaser, or purchasers, at such sale be entitled to a writ of assistance to obtain possession of the premises sold in manner as provided by law.

By the Court:

C.... K...., Clerk.

2226. Judgment for deficiency on mechanic's lien judgment (Wis. Stats. 1898 sec. 3326).

[*Title.*]

[*Caption as in Form 7.*]

The report of the sheriff of county [*or, of L.... M.... the referee herein*] who was directed to sell the premises described in the judgment in this action, having been filed on the day of, 19.., by which it appears that a deficiency [*or, deficiencies*] arose upon such sale in the payment of the amounts adjudged to be due to the lien claimants, as follows, to-wit [*here specify amount or amounts of deficiencies due each claimant*]; and the said report of sale having been duly confirmed by an order of the court, entered on the day of, 19.., and judgment for deficiency [*or, deficiencies*] having been ordered,

On motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED: 1. That the plaintiff A.... B.... do have and recover of the defendant [*name defendant personally liable*], the sum of dollars, the amount of such deficiency due to said A.... B.... [*proceed in the same way as to all lien claimants entitled to judgment for deficiency*].

By the Court:

R.... S....,

Circuit Judge.

2227. Interlocutory judgment for accounting in action for dissolution of partnership (Wis. Stats. 1898 sec. 2883).

[*Title.*]

[*Caption as in Form 7.*]

This action having been tried by the court and findings therein made which are of record, and the court having determined that an interlocutory judgment for an accounting should be entered;

On motion of G.... H...., plaintiff's attorney,

IT IS ADJUDGED: 1. That the partnership heretofore subsisting between the plaintiff and defendant C.... D.... under the firm name and style of A.... B.... & Co. be and the same is hereby dissolved.

2. *[If there are issues of fact on the merits which have been determined by the court and which are necessary to be adjudged before the account is taken insert the proper judgment here, as for instance]:* That the deed executed by the defendant C.... D.... to the defendant E.... F.... on the day of, 19.., purporting to convey the following described premises [*describe same*] be and the same is hereby set aside and held for naught, and the title of said premises is adjudged to be in the said defendant C.... D.... in trust for said partnership, the same being partnership property.

3. That it be referred to L.... M...., an attorney of this court, to take and state an account of all dealings and transactions between the plaintiff A.... B.... and defendant C.... D.... as partners aforesaid; and the said A.... B.... and C.... D.... are hereby required to produce before the said referee all books, deeds, papers and writings in their custody or under their control relating to said partnership or their dealings as partners, or the assets of said firm; that the said referee be empowered to examine said parties under oath, as well as other witnesses, and that he report the result of such accounting as well as the testimony taken with all convenient speed.

4. That upon the filing of the report of said referee the parties be at liberty to move for final judgment therein, as they shall be advised.

By the Court:

J.... K...., Clerk.

2228. Final judgment of dissolution of partnership, and closing up proceedings.

[*Title.*]

[*Caption as in Form 7.*]

This action having come on for final hearing upon the report of L.... M...., the referee, to take an account, appointed herein and it appearing from said account which is hereby in all respects confirmed that the respective interests of the plaintiff, A.... B...., and the defendant, C.... D...., in the assets of said firm are as follows [*state interests*];

And it further appearing from the report of the receiver heretofore appointed herein that after payment of all debts and demands against said firm and the expenses and compensation of said receiver there remains in his hands the sum of dollars for division between said partners; now, being fully advised in the premises,

Upon motion of G.... H.... attorney for the plaintiff,

IT IS ADJUDGED, that said receiver pay out of the moneys in his hands the sum of dollars, the costs of this action,

as taxed; that he retain the sum of dollars for his compensation and expenses, which sum is hereby allowed; and that he pay to the plaintiff A.... B.... dollars and to the defendant C.... D.... dollars, being their respective shares in the partnership assets as shown by said accounting;

It is further adjudged that the following real estate owned by said partnership [*describe same*] be and the same is hereby assigned to said partners as tenants in common, viz., to A.... B.... an undivided one-half and to the defendant C.... D.... an undivided one-half.

[*Insert such other provisions as are necessary.*]

It is further ordered that said receiver file with the clerk of this court a supplemental report showing his doings under the terms of this judgment.

By the Court:

R.... S...., Clerk.

2229. Judgment of reformation of a deed on ground of mistake.

[*Title.*]

[*Caption as in Form 7.*]

[*Recite trial and findings as in forms in immediately preceding chapters.*]

Now, on motion of G.... H.... attorney for plaintiff,

IT IS ADJUDGED that the deed of conveyance executed by the defendant C.... D.... to the plaintiff on the day of, 19.., and recorded in the office of the register of deeds, for county, on the day of, 19.., in volume of Deeds, on page, be and the same is hereby reformed and corrected according to the real intent of the parties, so the description therein shall read as follows [*insert true description*], and so reformed said deed shall convey said last described premises as fully as if the same had originally been described therein, and that said defendant C.... D.... within thirty days after the entry of this judgment and service on him of notice of entry thereof, execute and deliver to the plaintiff a deed of said premises conforming to this judgment, and that in case of his failure so to do, the title to said premises above described, do pass by this judgment from said defendant to, and vest in, the plaintiff in fee simple, as fully as if properly conveyed in said deed.

That the plaintiff, A.... B...., recover of the defendant, C.... D...., the costs of this action, taxed at dollars.

By the Court:

R.... S...., Clerk.

2230. Judgment correcting an account stated.

[Title.]

[Caption as in Form 7.]

[Recitals of trial and verdict or findings as in forms in immediately preceding chapters.]

On motion of G.... H.... attorney for plaintiff,

IT IS ADJUDGED that the account erroneously stated between the parties hereto on the day of, 19.., by which it appeared that the sum of dollars was due the plaintiff from the defendant as a balance of account, be and the same is hereby corrected by adding to the charges against the defendant in said account the sum of dollars [*or otherwise state the charge according to the fact*], making the correct balance due the plaintiff the sum of dollars.

Further adjudged that the plaintiff recover of the defendant the sum of dollars, being the balance justly due him on said account as corrected, together with the costs and disbursements of this action, taxed at dollars, making in all the sum of dollars.

By the Court:

R.... S...., Clerk.

2231. Judgment of contribution between sureties.

[Title.]

[Caption as in Form 7.]

[Recital of trial, verdict, or findings as in forms in immediately preceding chapter.]

On motion of G.... H.... plaintiff's attorney,

IT IS ADJUDGED that the plaintiff A.... B.... do have and recover of the defendant C.... D.... [*surety*] the sum of dollars, together with the costs and disbursements of this action, taxed at dollars.

[*If the judgment be against two or more sureties there should be a separate provision directing recovery of the proper share against each surety.*]

By the Court:

R.... S...., Clerk.

2232. Judgment affirming judgment of county court probating will (Wis. Stats. 1898 sec. 4037).

[Title.]

[Caption as in Form 7.]

[Recitals as in Form 2221.]

On motion of G.... H...., attorney for A.... B...., proponent of said will,

IT IS ADJUDGED that the order and judgment of the county court of county, dated and entered, 19.., admitting to probate that certain instrument in writing dated,

19.., as the last will and testament of E.... F...., deceased, be and the same is in all things affirmed, and that this matter and all records therein be transmitted to said county court with directions to said court to proceed therein as provided by law.

Further adjudged that the said proponent A.... B.... have and recover of the contestant C.... D.... the costs and disbursements of this appeal, taxed at dollars.

By the Court:

R.... S...., Clerk.

2233. Judgment adopting advisory verdict of jury and reversing judgment of county court refusing probate of will.

[*Title.*]

[*Caption as in Form 7.*]

[*Recite appeal as in Form 2221, and proceed*]: and the court having taken the advisory verdict of a jury upon the issues herein by which verdict it is found that said alleged will was executed under undue influence [*recite findings of verdict*], and the court having adopted said verdict as its findings on the matters so submitted and having filed its findings of fact and conclusions of law which are of record;

On motion of G.... H.... attorney for A.... B...., proponent of said will,

IT IS ADJUDGED that the order and judgment of the county court of county refusing probate to said will, dated, 19.., be and the same is hereby recovered, and that the said instrument propounded as the last will and testament of E.... F...., deceased, be, and the same is hereby admitted to probate, and that the papers and records herein be transmitted to said county court to proceed therein as provided by law.

[*Direction as to costs as in last form.*]

By the Court:

R.... S...., Clerk.

2234. Judgment construing will.

[*Title.*]

[*Caption as in Form 7.*]

[*Recitals of trial and findings as in immediately preceding chapters, and continuing*]:

On motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED that the true intent and meaning of the second clause of the will of E.... F...., deceased, set forth in the complaint herein is [*give construction adjudged by the court*].

[*Proceed in same manner as to other clauses.*]

[*If directions to the executor as to the execution of the will are applied for and necessary, proceed*]: That the said executor of said will, in carrying out the provisions thereof, do [*give directions*].

[*Add provision as to costs.*]

By the Court:

R.... S...., Clerk.

2235. Judgment establishing lost will.

[*Title.*]

[*Caption as in Form 7.*]

[*Recitals of trial and findings as in forms in immediately preceding chapters, and continuing*]:

On motion of G.... H...., attorney for the plaintiff,

IT IS ADJUDGED. 1. That E.... F...., late of in the county of, in said state, died on the day of, 19.., and that the plaintiff A.... B.... is the son of said deceased.

2. That said deceased, at, in said county, on or about the day of, 19.., duly signed and executed in writing and published in presence of two witnesses [*name them*] his last will and testament, and that said witnesses, at said time and place, in presence of said testator and at his request, and in presence of each other, duly subscribed said will as attesting witnesses.

3. That said will was in substance as follows [*give provisions of will as fully as possible*].

4. That the due execution of said will, and the provisions thereof, were clearly and satisfactorily proven by witnesses on the trial of this action.

5. That said will was never revoked or cancelled by the testator, but that the same was accidentally destroyed on or about the day of, 19.., by [*state manner of loss*] and that the same cannot now be found, though diligent search and inquiry have been made for the same.

6. That said will, as so executed, with the provisions above set forth, be and the same is hereby established and proven as the last will and testament of the said E.... F...., deceased, and that the county court of county issue letters testamentary thereon [*person named as executor*] upon his complying with the requirements of law, and proceed to the settlement of the estate as provided by the statute.

[*Direction as to costs.*]

By the Court:

R.... S...., Clerk.

2236. Judgment against receiver in his official capacity.

[Title.]

[Caption as in Form 7.]

[Proceed with recitals of the trial and verdict or finding as in ordinary judgments, and continue]:

Now, therefore, on motion of E.... F...., attorney for plaintiff,

IT IS ADJUDGED that out of any funds now in, or hereafter to come to his hands, which may under the direction of the court by which he was appointed be applicable to that purpose, the defendant R.... S...., as such receiver of C...D...., pay to the plaintiff A.... B.... the sum of dollars, the damages found against said receiver in this action, together with dollars, the costs and disbursements herein, as taxed.

By the Court:

R.... S...., Clerk.

2237. Judgment in action to enforce lien on logs or timber, after jury trial (Wis. Stats. 1898 sec. 3340).

[Title.]

[Caption as in Form 7.]

This cause having been tried before the court, Hon. J.... K...., circuit judge, presiding, and a jury, and the jury having rendered their verdict, which is of record, wherein they find for the plaintiff and assess his damages at the sum of dollars, which sum is due for labor and services performed as charged in the complaint, and that the same is a lien upon the logs or timber described in the complaint [*or, upon a part of the logs or timber described in the complaint*], to-wit, upon [*describe the part as in the verdict*], and the court having directed judgment accordingly,

On motion of E.... F...., Esq., plaintiff's attorney,

IT IS ADJUDGED that A.... B...., the plaintiff, do have and recover of the defendant, C.... D...., the sum of dollars, damages, together with the sum of dollars and cents, costs and disbursements of this action, and that the same is a lien upon [a part of] the property described in the complaint, to-wit [*here describe the logs, timber, lumber, subject to lien*].

By the Court:

R.... S...., Clerk.

CHAPTER CL.

JUDGMENTS BY CONFESSION.

- | | |
|--|---|
| 2238. Judgment roll on cognovit or judgment note (Wisconsin and Minnesota). | 2250. The same, a fuller form, deducting payments. |
| 2239. Statement for confession of judgment by defendant in person (Minnesota, Iowa, North Dakota and South Dakota). | 2251. The same, for attorney's services. |
| 2240. Judgment upon foregoing confession (Minnesota and Iowa). | 2252. The same, on an account, for money, goods and services. |
| 2241. Order for judgment upon foregoing confession, to be indorsed thereon (North Dakota and South Dakota). | 2253. The same, on promissory note or bill of exchange. |
| 2242. Concise statement of the facts out of which debt arose or liability accrued, to be inserted in Form 2239, according to the fact; money lent. | 2254. The same, on promissory notes for borrowed money. |
| 2243. The same, loan to corporation. | 2255. The same, given for goods sold. |
| 2244. The same, loans at several times. | 2256. Upon a note and costs of suit thereon. |
| 2245. The same, a fuller form. | 2257. The same, by an indorser, to his indorsee. |
| 2246. The same, for assuming to pay defendant's note. | 2258. The same, by an indorser, to a remote indorsee. |
| 2247. The same, for purchase money of land. | 2259. The same, for a debt not yet due. |
| 2248. The same, on a bond for balance of purchase money. | 2260. The same, for rent not yet accrued. |
| 2249. The same, for goods sold. | 2261. The same, on the contingent liability to an accommodation indorser of a note. |
| | 2262. The same, of a draft. |
| | 2263. The same, of an acceptance; the bill having been negotiated. |
| | 2264. Judgment by confession in open court (Nebraska). |
| | 2265. Warrant of attorney to confess judgment. |

The statutes in all the states covered by this work provide for the entry of judgments by confession without action, although the manner of entry varies considerably. Too much care can not be taken to fully satisfy the requirements of the statute authorizing the entry of the judgment. The forms in this chapter are believed to be sufficient to meet the calls of the statutes of the various states for which they have been, respectively, prepared, as indicated in their titles.

2238. Judgment roll on cognovit or judgment note (Wis. Stats. 1898 secs. 2895, 2896; Minn. Rev. Laws 1905 sec. 4285).

[*Title.*]

BE IT REMEMBERED, that on this day of, 19.., comes the plaintiff above named, by G.... H...., his attorney, and files his complaint against the said defendant, together with an affidavit thereto annexed, which complaint and affidavit are as follows, to-wit:

STATE OF WISCONSIN,
In Court for County.

A.... B....,	} Complaint.
Plaintiff,	
vs.	
C.... D....,	} Defendant.
Defendant.	

The above named plaintiff complaining of the above named defendant, alleges:

That on or about the day of, 19.., at, in said county, the defendant above named, for a valuable consideration, made, executed and delivered unto the plaintiff his certain promissory note in writing, bearing date on that day, whereby for value received the said defendant promised to pay the said plaintiff, ... days after the date thereof, the sum of dollars, with interest at the rate of per cent. per annum, from date until paid, and although the said promissory note became due and payable before the commencement of this proceeding, yet the defendant has not paid the same or any part thereof.

That the plaintiff is now the lawful owner and holder of said note, and the defendant is justly indebted to him thereupon in the sum of dollars, principal and interest as aforesaid.

WHEREFORE the plaintiff demands judgment against the defendant for the said principal sum and interest as aforesaid, together with the costs and disbursements of this action.

G.... H....,
Plaintiff's Attorney.

[*Venue.*]

G.... H...., being first duly sworn, on oath says that he is the attorney of the plaintiff in the above entitled action, and that he makes this affidavit in his behalf; that he has read the foregoing complaint and knows the contents thereof, and that the same is true, as he verily believes; that the said plaintiff is now

the lawful owner and holder of the note mentioned in said complaint, and that there is now due thereon the sum of dollars; that this affidavit is made by him because the said action is founded upon an instrument for the payment of money only, and that the promissory note mentioned in said complaint is in his possession as such attorney, and that his means of knowledge are the said note so in his possession as aforesaid and the indorsements thereon made, and the admission of the defendant to this affiant that the said note and interest are justly due in amount as above stated.

That the reason this affidavit is not made by the plaintiff is that the plaintiff is now absent from county, where affiant resides, and the further reasons above stated.

G.... H....

[*Jurat.*]

The plaintiff aforesaid also produces and files herewith the note mentioned in the foregoing complaint, together with the warrant of attorney authorizing judgment to be confessed thereon, being the same hereto attached, as follows, to-wit:

[*Insert original note and warrant of attorney.*]¹

The said plaintiff also files with the said complaint the answer of said defendant thereto, signed by an attorney in his behalf, being the same here following, to-wit:

STATE OF WISCONSIN,
Circuit Court for County.

A.... B....,

Plaintiff

vs.

C.... D....,

Defendant.

Answer.

And now comes the above named defendant, by J.... K...., his attorney, and by virtue of the power of attorney hereto annexed, waives the service of process upon the said defendant, and enters his appearance herein and confesses all the allegations in the plaintiff's complaint, and that there is due from the defendant to the plaintiff on the note described therein, the sum of, ... dollars, and hereby confesses and authorizes judgment for that amount, together with costs; and now here releases all errors which may intervene in entering up judgment

¹ In Minnesota the power of attorney or instrument authorizing confession of judgment must be a separate instrument from the

note, contract, or other evidence of the demand for which judgment is confessed. Minn. Rev. Laws 1905 sec. 4285.

thereon, and in issuing execution on said judgment; and waives notice of the taxation of said costs and consents that the same may be taxed and allowed at the sum of dollars.

J.... K....,
Defendant's Attorney,
....., Wis.

STATE OF WISCONSIN,
Circuit Court for County.

A.... B....,	} Judgment.
vs.	
C.... D....,	
Plaintiff,	
Defendant.	

On reading and filing the complaint of the plaintiff above named, together with the note described therein, also an affidavit of the amount due on said note, and the answer of the defendant confessing all the allegations of the complaint, and submitting to judgment in favor of the above named plaintiff and against said defendant for the amount claimed in the complaint, together with costs as therein stipulated, and a warrant of attorney signed by the said defendant authorizing the confession of judgment on the note mentioned in said complaint having been produced and exhibited to me and filed with said complaint and answer.

Now, therefore, on motion of G.... H...., attorney for said plaintiff,

IT IS HEREBY ADJUDGED, that the said plaintiff, A.... B...., do have and recover of the said defendant, C.... D...., the sum of dollars, claimed in the said complaint and confessed by said answer, together with the sum of dollars, costs of this judgment as stipulated and taxed, amounting in all to the sum of dollars; and let the clerk enter this judgment of record.

Dated this day of, 19..

R.... S....,
Circuit Judge.

Y.... Z....,
Clerk.

STATEMENT FOR JUDGMENT.

Amount confessed \$.....

COSTS.

State tax \$1 00

Clerk's fees

Costs by statute
 Commissioner's fees
 Affidavits
 Taxed at \$.....
 Y.... Z....,
 Clerk.

[In case the judgment be for less than \$100, costs are limited to five dollars. Wis. Stats. 1898 sec. 2921.]

[In case judgment is entered upon an answer confessing judgment, signed by the defendant personally, no warrant of attorney is necessary, and the foregoing forms may be easily varied to meet the case.]

2239. Statement for confession of judgment by defendant in person (Minn. Rev. Laws 1905 sec. 4284; Iowa Code secs. 3813-3815; N. Dak. Rev. Codes secs. 6130, 6131; S. Dak. Rev. Codes C. P. secs. 784-786).

STATE OF
 Court, County of

A.... B....,	} Plaintiff,
against	
C.... D....,	
	Defendant.

I [or, we] hereby confess judgment in favor of A.... B...., plaintiff above named, for dollars; and authorize the entry of judgment therefor against me.

This confession of judgment is for a debt now justly due [or, a debt justly to become due], from me to the plaintiff [or, if a contingent liability, say, is to secure the plaintiff against a liability on my behalf], arising upon the following facts [here state the facts concisely out of which the debt or liability arose, as in Forms 2242-2263].

[Venue.]

C.... D.... being duly sworn says he is the person who executed the foregoing statement and confession and that the facts therein stated are true to his own knowledge [add, if any allegations are made upon information and belief], except as to those matters therein stated to be upon information and belief, and as to those matters he believes it to be true.

C.... D....

[Jurat.]

2240. Judgment upon foregoing confession (Minnesota and Iowa).

[*Title.*]

Be it remembered that on this day of, 19.., came the parties herein, and said defendant made and filed in my office his written verified statement whereby he confesses himself indebted to the plaintiff in the sum of dollars and authorizes the entry of judgment thereon for said sum with costs.

Now, therefore, in pursuance of said statement and confession so filed,

IT IS ADJUDGED that the plaintiff A.... B.... do have and recover of the defendant C.... D.... the sum of dollars with costs, taxed at dollars, making in all the sum of dollars.

Dated, 19..

By the Court:

R.... S...., Clerk.

2241. Order for judgment upon foregoing confession to be indorsed thereon (North Dakota and South Dakota).

[*Title.*]

Upon presentation to the court of the within statement and confession,

IT IS ORDERED that the clerk of said court do forthwith enter judgment in favor of said A.... B...., plaintiff, against said C.... D...., defendant, for the amount so confessed, to-wit, the sum of dollars, with costs.

Dated, 19..

By the Court:

L.... M...., Judge.

[*The judgment may be as in the last preceding form reciting the fact of the order.*]

2242. Concise statement of the facts out of which debt arose or liability accrued, to be inserted in Form 2239, according to the fact; money lent (Johnston v. McCausland, 9 Abb. Pr. 214).

On or about the day of, 19.., the plaintiff lent or advanced to the defendant, in cash, the sum of dollars, which said sum with interest thereon from the said day of, 19.., amounting to dollars, is now justly due by the defendant to the plaintiff, and which said sums of principal and interest amount to the said sum of dollars.

2243. The same, loan to corporation.

Upon the day of, 19.., the plaintiff loaned to the defendants the sum of dollars, borrowed by them to be used in [*here state object within the business or special powers of the corporation*], which sum so loaned the defendants then and there promised to repay with interest within months thereafter [*or, on demand*], but no part thereof has been paid [except, etc.], which sum, with interest thereon, amounts to said sum of dollars.

2244. The same, loans at several times (Lyon v. Sherman, 14 Abb. Pr. 393).

The said sum of dollars is the balance [*or, amount*] due the said plaintiff of various sums of money lent and advanced by him to the said defendant during the last three years [*or other period, designating it*], and includes interest upon such loans and advances to this date.

2245. The same, a fuller form (Mott v. Davis, 15 How. Pr. 67).

Between the day of, 19.., and this date, the plaintiff has lent to the defendant the sum of dollars, at the times and in the sums set forth in a schedule annexed, which is hereby made a part of this statement [*annex account giving dates and sums opposite*], and which sum with interest amounts to said sum of dollars, and is still unpaid.

[*Annex to the statement an account signed by the defendant.*]

2246. The same, for assuming to pay defendant's note (Lanning v. Carpenter, 20 N. Y. 447).

For the said plaintiff assuming the payment of the sum of dollars, at the Bank of, on the day of, 19.., by which a note of dollars made by me, payable to the order of M.... N...., at the said Bank, dated the day of, 19.., and indorsed by the said M.... N.... and one O.... P...., was paid and taken up by said plaintiff.

2247. The same, for purchase-money of land.

On the day of, 19.., at, the plaintiff sold and conveyed to me a piece of land in the town of, county of, state of, known as follows [*very brief description*], for which I then promised to pay said dollars, which sum has not been paid.

2248. The same, on a bond for balance of purchase-money (McDowell v. Daniels, 38 Barb. 143).

A bond of C.... D.... [*the defendant*], dated December 1st, 19.., for dollars, given for the balance of purchase-money for certain real, mill property, in county, town of, conveyed by A.... B.... [*the plaintiff*] to C.... D.... [*the defendant*], on which bond there is due and unpaid said sum of dollars.

2249. The same, for goods sold.

On the day of, 19.., at, the plaintiff sold and delivered to us ten barrels of flour, one hogshead of molasses, and three firkins of butter; for which we agreed to pay the sum of dollars, within months thereafter.

On the day of, 19.., at, the plaintiff sold and delivered to us ten pieces of linen sheetings, and twelve pieces assorted calicoes, for which we agreed to pay the sum of dollars, within months thereafter.

2250. The same, a fuller form, deducting payments.

The balance due on an account, for goods sold by the said A.... B.... to me the said C.... D.... \$500 00
Said goods were sold as above mentioned by the said A.... B.... to the said C.... D...., at the store of the said A.... B...., in the city of, and consisted of liquors, which were received by the said C.... D.... at the several times they were purchased, and used by him in his hotel, in said city, and the same were all delivered at various times, between the day of, 19.., and the day of, 19.., during which time the amount of liquors so sold by the said A.... B.... to the said C.... D.... was \$1250.00. And between the day of, 19.., and the day of, 19.., the said C.... D.... paid to the said A.... B...., on the above account, at different times, sums of money in small amounts, amounting in all to \$750.00.....
And the said A.... B.... claims interest on the said balance of account from the day of, 19.., which is six months..... 17 50

\$517 50

2251. The same, for attorney's services (Stebbins v. M. E. Church, 12 How. Pr. 410).

In the month of, 19.., the plaintiff, being an attorney and counsellor-at-law, was retained by me to commence and

prosecute a suit against one M.... N.... in the court of county and between that time and the day of, 19.., he rendered professional services to me in the commencement and conduct of said suit.

In the month of, 19.., said plaintiff was retained by me and acted as counsel, aided and assisted in the defense of a suit brought against me by one O.... P.... in the court of county.

Said services were reasonably worth the sum of dollars [which became due on the day of, 19.., interest whereon to date is dollars]. No part of which has been paid.

2252. The same, on an account, for money, goods and services.

I have received from the plaintiff, for my benefit, the following money, goods, and services, of the value and at the times stated, as follows:

19..

June 1.	Wheat delivered at my store in ———		\$402 12
July 6.	Barrels delivered at ———		124 25
“ 18.	Flour delivered at ———		505 00
Aug. 10.	Cash		50 00
“ 20.	Transportation of my goods from ——— to ———		37 63

I have paid or delivered to the plaintiff, on account thereof, the following moneys, or goods, of the value and at the times stated, as follows:

19..

Aug. 18.	Cash	\$ 24 00
Oct. 10.	Groceries	92 00

2253. The same, on promissory note or bill of exchange.

On the day of, 19.., at, I made and delivered to the defendant, my promissory note [*or, my acceptance of a bill of exchange*], of which the following is a copy. [*Copy of the note.*]

[*State the indebtedness for which note was given, e. g., thus*]: The consideration of said note [*or acceptance*] was a loan of dollars made by the plaintiff to me, on the day of, 19.., at, which sum I then and there promised to repay with interest, within months thereafter [*or, on demand*]; and to secure the payment of which sum said note [*or, acceptance*] was given, no part of which note has been paid.

2254. The same, on promissory notes for borrowed money.

One promissory note, given by me to said plaintiff, on the day of, 19.., for dollars, for borrowed money, on which is indorsed dollars, said note due when given. Also one promissory note of dollars, made by me, and dated, 19.., due when given, and now owned by said defendant, the same being given for borrowed money. The amount due on said notes for principal and interest being dollars.

2255. The same, given for goods sold.

On a promissory note, dated on the day of, 19.., given by me to the said plaintiff, for the price of one hundred barrels of flour, theretofore and about the month of, 19.., sold and delivered by said plaintiff to me, which note is still unpaid.

2256. Upon a note and costs of suit thereon (Frelich v. Brint, 22 N. Y. 418).

A promissory note, made by the defendants to the plaintiff, dated the day of, 19.., in the sum of dollars, with interest, that amount of money having been received by the defendants of the plaintiff [under a promise to repay it with interest], and upon which there is this day due the sum of dollars, together with dollars now due the plaintiff from the defendants, as costs in an action brought against the defendants by the plaintiff, on said promissory note, in the court, which suit is now discontinued by the plaintiff upon this confession of judgment to him by the defendants.

2257. The same, by an indorser, to his indorsee.

In consideration of [*state consideration, as in other cases*] on the day of, 19.., I indorsed to the plaintiff a promissory note, before its maturity, which note was made by one M.... N...., bearing date on the day of, 19.., at, for the sum of dollars, payable to [my order], on the day of, 19.. [*or, ... days after date*]; and the same was thereafter dishonored, and remains unpaid.

2258. The same, by an indorser, to a remote indorsee.

I indorsed and negotiated, before its maturity, a bill of exchange, made by one M.... N...., bearing date on the day of, 19.., at whereby said M.... N.... re-

quired one O.... P.... to pay to [my order] dollars [.... days after sight thereof] which bill was afterwards transferred to the plaintiff, and has been dishonored, and remains unpaid.

2259. The same, for a debt not yet due.²

[*State facts, as in other cases, adding*]: And this confession of judgment is made to secure the plaintiff in case of non-payment of the said sum when due.

2260. The same, for rent not yet accrued.

I entered into an agreement [in writing] dated, 19.., with the plaintiff, whereby he leased to me and I hired from him the dwelling-house in, known as No., ... street [*or otherwise briefly describe the leasehold property*], for years from the day of, 19.., at the annual rent of dollars, payable quarterly on the last days of and in each year.

That during the quarter which will expire on the day of next, I have had possession of said house under the said agreement, but no part of the rent reserved therefor has been paid [except, etc.] but the sum of dollars will become due therefor on the day of, 19.., aforesaid.

2261. The same, on the contingent liability to an accommodation indorser of a note (Healy v. Preston, 14 How. Pr. 20).

The sum of dollars is to indemnify the said A.... B.... [*the plaintiff*] against all liabilities on a note made by the said C.... D.... [*the defendant*] for dollars, payable at the [*naming the bank*], and dated on or about the day of, 19.., and due on or about the day of, 19.., which said note was indorsed by the said plaintiff, A.... B...., for the benefit of the said defendant, C.... D...., and is unpaid.

2262. The same, of a draft (Dow v. Platner, 16 N. Y. 562).

My draft upon [*naming drawees*] of the city of, dated the day of, 19.., payable at sixty days from date, for eight hundred dollars, and indorsed by said A.... B.... [*the plaintiff*] as my surety and for my benefit.

² As to when judgment may be confessed to secure the repayment of future advances, see *Truscott v. King*, 6 N. Y. 147.

2263. The same, of an acceptance; the bill having been negotiated.

On the day of, 19.., at, the plaintiff accepted a certain bill of exchange for dollars, made by me, dated the day of, 19.., and payable days after the date thereof, to my order, and then and there delivered said acceptance to me to be used for my benefit.

[On the day of, 19.., I procured said acceptance to be discounted by one M.... N...., who paid me the said sum, deducting legal interest thereon for the time the said note then had to run.]

2264. Judgment by confession in open court (Cobb. Ann. Stats. Nebr. secs. 1423, 1424).

[*Title.*]

On this day of, 19.., come the above named parties in open court, and the said defendant C.... D.... says that he is justly indebted to the said plaintiff in the sum of dollars, upon a certain promissory note executed by said defendant to the plaintiff for borrowed money, of which the following is a copy [*insert copy of note*]. [*Or state showing the indebtedness as in Forms 2242 to 2263 inclusive.*]

And the said plaintiff being present in court and consenting thereto, the said defendant C.... D.... confesses judgment for said demand and asks that judgment be rendered against him thereof in favor of the plaintiff for said sum of dollars;

IT IS ADJUDGED [*conclude as in Form 2240*].

[*If an attorney confess judgment he must produce the warrant to the court and file the same or a copy, in which case the above form should be waived by reciting the fact of confession by the attorney and the production and filing of the warrant. Cobb. Ann. Stats. Nebr. sec. 1426.*]

2265. Warrant of attorney to confess judgment.

KNOW ALL MEN by these presents, that I, C.... D.... of, in the state of, have made, constituted and appointed, and by these presents do make, constitute and appoint G.... H...., Esq., of, in the state of, my true and lawful attorney for me and in my name, place and stead, to appear before the court of county, in the state of [*or before any court of record in the state of*], and there to waive issuance and service of process, and to confess judgment in favor of A.... B.... of, in the state of against me in the sum of dollars, with interest

thereon at the rate of per cent. per annum from the day of, 19.. Said indebtedness being now due and payable, and incurred on account of [*state consideration*] hereby giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully to all intents and purposes, as I might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done by virtue thereof.

IN WITNESS whereof, I have hereunto set my hand and seal the day of, 19..

C.... D.... [Seal.]

Signed and delivered in the
presence of [*two witnesses*].
[*Venue*.]

Be it known, that on the day of, 19.., before me, a notary public in and for said county and state, personally appeared C.... D...., above named, who is to me known to be the person described in and who executed the above warrant of attorney, and acknowledged that he executed the same voluntarily as his free act and deed, for the uses and purposes therein set forth.

[OFFICIAL SEAL.]

In testimony whereof, I have
hereunto subscribed my name and
affixed my official seal, the day
and year last above written.

O.... P....,
Notary Public,
..... County.

CHAPTER CLI.

PROCEEDINGS TO BIND JOINT DEBTORS NOT SERVED.

- | | |
|--|--|
| <p>2266. Summons against a joint debtor not served in original action.</p> <p>2267. Summons against a defendant attempted to be served by publication but of whom jurisdiction was not obtained (Wisconsin).</p> <p>2268. Answer to foregoing summons.</p> <p>2269. Judgment against joint</p> | <p>debtor not originally served.</p> <p>2270. Affidavit for attachment against joint debtor refusing to apply property charged to the payment of the judgment.</p> <p>2271. Order to show cause on foregoing affidavit.</p> <p>2272. Attachment thereon.</p> |
|--|--|

The statutes of several states provide that in actions on a joint contract where the summons is not served upon all the action may proceed against those served unless the court otherwise directs and judgment may be entered in form against all, but only to be enforced against the joint property of all and the separate property of the defendant or defendants on whom service is made. Wis. Stats. 1898 sec. 2884; N. Dak. Rev. Code sec. 5261; S. Dak. Rev. Codes C. P. sec. 113. In these states further provisions are made for a subsequent proceeding in the nature of a proceeding on the foot of the judgment to bind the joint debtors not served originally by the judgment. Wis. Stats. 1898 secs. 2795-2798; N. Dak. Rev. Codes secs. 5633-5638; S. Dak. Rev. Codes C. P. secs. 466-471. In Wisconsin the same procedure may be resorted to in any action where service by publication was attempted but jurisdiction was not acquired. Wis. Stats. 1898 sec. 2799. The forms in this chapter are designed to answer the requirements of those provisions.

2266. Summons against a joint debtor not served in original action.

STATE OF
 Court, County of

A.... B...., vs. C.... D...., E.... F.... and G.... H....	Plaintiff, } Defendants.	
---	---	--

The state of to the above named defendant G.... H....:

You are hereby summoned to show cause within twenty [*in North Dakota and South Dakota thirty*] days after the service

this summons on you, exclusive of the day of service, why you should not be bound by a certain judgment rendered in the above entitled action, in said court, on the day of, 19.., in favor of the above named plaintiff, and against said defendants above named, for the sum of dollars, damages and costs, in the same manner as if you had been originally summoned.

J.... K....,
Plaintiff's Attorney.

[*Affidavit accompanying summons*] :

[*Venue.*]

A.... B...., being duly sworn, says he is the plaintiff above named, and that to his personal knowledge the judgment described in the foregoing summons has not been satisfied either in whole or in part, and that there is now actually due thereon the sum of dollars, damages and costs, with interest thereon from, 19..

A.... B...

[*Jurat.*]

2267. Summons against a defendant attempted to be served by publication but of whom jurisdiction was not obtained (Wis. Stats. 1898 sec. 2799).

[*Title as in last preceding form.*]

The state of Wisconsin to the above named defendant, C....
D....:

You are hereby summoned to show cause within twenty days after the service of this summons on you, exclusive of the day of service, why you should not be bound by a certain judgment rendered in the above entitled action, in said court, on the day of, 19.., in favor of the above named plaintiff, and in form against you, for the sum of dollars, damages and costs, in the same manner as if you had been originally summoned, and jurisdiction obtained.

J.... K....,
Plaintiff's Attorney.
..... Wis.

[*Attach affidavit as in last form if the judgment is for money.*]

2268. Answer to foregoing summons.

[*Title.*]

The defendant, G.... H...., above named, answering the summons and complaint herein, alleges [*here state defenses,—e. g., thus*] :

First. For a first defense to the claim made by said summons,

That no such judgment as is mentioned in said summons was ever rendered.

Second. And for a second defense,

That on the day of, 19.., on a settlement and compromise of mutual claims and demands then and there had between the plaintiff and the defendants [*or, the defendant*] above named, the plaintiff and the defendants [*or, defendant*] then and there executed and delivered under their respective hands and seals, mutual releases of all debts, dues, claims, demands, suits, judgments, and decrees, of whatever nature, therefore accrued or existing.

[To be verified if the complaint is verified.]

[Any defense which might be made originally to the complaint may be pleaded, or any defense which may have arisen subsequently. In North Dakota and South Dakota, however, the statute of limitations can not be pleaded as a defense. Subsequent pleadings and the trial are governed by the same rule as like proceedings in actions.]

2269. Judgment against joint debtor not originally served.

[Title.]

[Caption as in Form 7.]

On reading and filing the summons issued herein, whereby the defendant G.... H.... was required to show cause why he should not be bound by the judgment herein rendered in form by this court against all the defendants above named on the day of, 19.., and upon reading and filing the affidavit of the plaintiff accompanying said summons that to his knowledge said judgment has not been satisfied in whole or in part, and that the amount actually due thereon is dollars, with interest from the date of said judgment, and it appearing by due proof that said summons and affidavit have been duly and personally served on said G.... H...., on the day of, 19.., and no copy of an answer or demurrer thereto having been served on the plaintiff or his attorney as appears by the affidavit of M.... N.... on file, and the said defendant not appearing to show cause pursuant to said summons; and the time for answering said summons having expired [*or if the judgment is after a trial, recite the proceedings as in forms in chapter CXLVIII*];

And it appearing to the court that the plaintiff is entitled to judgment that said defendant, G.... H...., be bound by the judgment heretofore rendered in form against all the defendants, in the same manner as if he had been originally summoned in this action, and that the sum of dollars is still due and unpaid on said judgment;

Now, on motion of J.... K...., attorney for the plaintiff,

IT IS ADJUDGED that the said judgment is a valid judgment against the said G.... H.... and that the defendant, G.... H...., should be and is hereby adjudged to be bound by said judgment in the same manner as if originally summoned, in the full sum of dollars [*name amount unpaid on the judgment*], with interest from, 19.., with costs of this proceeding taxed at dollars, and that the plaintiff have execution therefor.

By the Court:

R.... S...., Clerk.

2270. Affidavit for attachment against joint debtor refusing to apply property charged to the payment of the judgment.¹

[*Title.*]

[*Venue.*]

A.... B.... being duly sworn, says:

1. That he is the plaintiff above named; and that he recovered a judgment in form against all of said defendants as joint debtors for dollars, damages and costs, which was docketed in the office of the clerk of this court, on the day of, 19..

2. That the summons herein was not originally served upon the defendant, G.... H...., before judgment, and that upon proceedings duly had in the court after the entry of said judgment a further order and judgment was duly made and entered by this court on the day of, 19.., adjudging that the said G.... H.... be bound by said first named judgment in the same manner as if originally served with the summons.

3. That at the time of the entry of said original judgment the said G.... H.... had in his possession certain property, to-wit [*describe same*] which was a part of the joint property of said [*name all joint debtors*], and which he still retains [*or which the said G.... H.... thereafter converted to his own use and which was and is of the reasonable value of dollars, and which he refuses to apply in satisfaction of said judgment, and which cannot be reached by execution thereon.*

A.... B....

[*Jurat.*]

¹ In case joint property has been received by the debtor not originally served, and he refuses to apply the same in payment of the judgment, and it cannot be reached by execution, he may be

proceeded against by attachment for contempt, as in this and following forms. Wis. Stats. 1898 sec. 2797; N. Dak. Rev. Codes sec. 5637; S. Dak. Rev. Codes C. P. sec. 470.

2271. Order to show cause on foregoing affidavit.

[Title.]

On reading and filing the affidavit of A.... B...., above named, whereby it appears that the said A.... B.... recovered a judgment in form against all of said defendants as joint debtors for dollars damages and costs, which was docketed, etc. [*recite all the allegations of fact in the affidavit*];

ORDERED that the said G.... H.... satisfy the said original judgment out of the joint property of said defendants in his hands as aforesaid [*or that he pay into the office of the clerk of this court to be applied on said judgment the sum of dollars, being the amount recovered by him upon sale of said joint property, or make other direction as to the application of the joint property or its proceeds, as the case may require*], or show cause before this court at the court house in the city of in said county on the day of, 19.., at o'clock A. M. of that day why an attachment should not issue against him for contempt in refusing so to apply said property.

[Date.]

L.... M...., Judge.

2272. Attachment thereon.

The State of to the Sheriff of the County of

GREETING: Whereas, it has been made to appear to our court of county, by due proof, that [*here recite the facts, if found to be true, substantially as stated in the preceding affidavit and order to show cause*];

NOW, THEREFORE, we command you that you attach G.... H...., of, so that you may have him before the court, at a term of said court, to be held at the, in the city of, on the day of, 19.., to answer for the contempt by him committed, in refusing to apply said property in payment of said judgment, and have you then and there this writ.

WITNESS the Hon. L....

M...., judge of our court
for the county of, this
.... day of, 19..

[SEAL OF COURT.]

R.... S...., Clerk.

[*Further proceedings on the attachment may be as in Forms 2017-2023, Wis. Stats. 1898, sec. 3488; N. Dak. Rev. Codes sec. 5942.*]

CHAPTER CLII.

PROCEEDINGS TO OPEN DEFAULTS AND SET ASIDE JUDGMENTS.

- | | |
|---|---|
| 2273. Affidavit to open default judgment and for leave to answer. | 2278. Order setting aside service of summons and judgment for lack of jurisdiction. |
| 2274. Notice of motion on foregoing affidavit. | 2279. Affidavit to open default and defend, by defendant served by publication who received no actual notice (Wisconsin). |
| 2275. Order granting motion to open default judgment. | 2280. Petition in action to vacate a judgment erroneously entered (Iowa). |
| 2276. Affidavit to set aside service of summons and judgment because of insufficient service. | 2281. Outline of complaint to set aside judgment procured by perjury or fraud (Minnesota). |
| 2277. Notice of special appearance and motion on foregoing affidavit. | |

By the principles of the common law every court of record has power to vacate and set aside its orders and judgments improvidently rendered, at any time during the term at which the same were rendered, but not afterwards except by express legislative authority. The codes generally give the same power upon application within one year after notice of the judgment or order, if it be made to appear that the default was the result of mistake, inadvertence, surprise or excusable neglect. Wis. Stats. 1898 sec. 2832; Minn. Rev. Laws 1905 sec. 4160; N. Dak. Rev. Codes sec. 5298; S. Dak. Rev. Codes C. P. sec. 150. In Iowa application to set aside a default must be at the term or on the first day of the next term if the default be entered in vacation (Iowa Code sec. 3790); but final judgments or orders may be vacated for various causes by action provided the action is brought within one year after the judgment or order was made (Iowa Code secs. 4091-4099), and in Nebraska final orders and judgments may be vacated by action brought within various periods from one to three years, according to the nature of the ground relied on (Cobb. Ann. Stats. secs. 1612-1621).

A motion to set aside a judgment should be made with diligence, and must be accompanied with an affidavit of merits and a verified answer stating a good defense, as courts will not set

aside a judgment for mere irregularity unless it also appears that there is a defense on the merits and that the party has acted with promptitude after notice of the entry thereof.

Where no jurisdiction was obtained by service of process the judgment or return of service may be set aside without a showing of merits or proposed defense but the appearance should be special for this purpose alone.

In Minnesota a judgment obtained by perjury or fraud may be set aside by equitable action brought within three years after discovery of the perjury or fraud by the defeated party. Minn. Rev. Laws 1905 sec. 4277.

In case of service by publication, if it appear that the defendant did not receive the summons by mail, he may be allowed to defend on terms after judgment within one year after actual notice thereof and within three years after entry of the judgment. Wis. Stats. 1898 sec. 2833.

2273. Affidavit to open default judgment and for leave to answer.

[*Title.*]

[*Venue.*]

C.... D.... being duly sworn says that he is the defendant above named; that judgment by default was rendered by this court in said action in favor of said plaintiff and against this defendant for the sum of dollars damages and costs [*or otherwise state the nature of the judgment according to the fact*] on the day of, 19.. *

That defendant has a complete defense to said action and to the whole thereof, and intended to interpose such defense, but that before he had opportunity to consult or employ an attorney herein and upon the day following the service of the summons herein upon him, to-wit the day of, 19.., he was taken violently ill, and was confined to his bed in an unconscious condition for the space of days, and was unable to attend to any business or even converse with any person, and that while still in said condition the judgment herein was entered on account of the defendant's failure to appear or make answer to the complaint herein. [*Or allege the facts showing mistake, surprise, inadvertence or excusable neglect, according to the fact.*]

That the defendant first learned that said judgment had been rendered against him on the day of, 19.., and immediately consulted and retained G.... H...., Esq., as his attorney to take proceedings to have said default opened and make his defense.

That he has fully and fairly stated the case in this action to G.... H...., Esq., his said counsel, who resides at in said county, and that he is advised by his said counsel, upon such statement there made, that he has a valid and substantial defense to said action upon the merits and to the whole thereof, and that his said defense is fully and truly set forth in his verified answer to said complaint, a copy of which answer is hereto attached marked Exhibit A, and which he prays leave to serve and file herein.

C.... D....

[*Jurat.*]

[*Add corroborating affidavits as to the fact of the mistake or surprise, if possible, and attach proposed verified answer.*]

2274. Notice of motion on foregoing affidavit.

[*Title.*]

Please take notice that upon the affidavits of G.... H.... and J.... K.... and the proposed answer of the defendant G.... H...., of all of which copies are herewith served upon him, the defendant C.... D.... by his counsel G.... H.... will move the court at the next term thereof, to be held at the court house in the of in county, at the opening of court on that day or as soon thereafter as counsel can be heard, to set aside the judgment entered in this action, and all subsequent proceedings thereon, and to allow this defendant to file and serve his said answer, and defend said action on such terms as may be just, and for such other order or relief as may be proper.

G.... H....,

To L.... M....,

Defendant's Attorney.

Attorney for Plaintiff.

2275. Order granting motion to open default judgment.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the defendant C.... D...., to set aside the judgment herein and allow him to defend said action, coming on to be heard at said term on the affidavits of C.... D...., defendant, and J.... K.... and the proposed verified answer of said C.... D.... and it satisfactorily appearing therefrom that said judgment was rendered through the mistake [*or surprise or excusable neglect*] of the said C.... D.... and it appearing by said proposed answer that said defendant has a valid and substantial defense to said action upon the merits and is so advised by his counsel to whom he has fully stated the case; after hearing G.... H.... for the motion, and L.... M.... in

opposition thereto, and after reading the opposing affidavits of O.... P.... and J.... K....,

On motion of G.... H...., defendant's attorney,

IT IS ORDERED: that said judgment entered in this action on the day of, 19.., in favor of the plaintiff and against the defendant, for the sum of dollars, damages, and dollars, costs, be and the same is hereby vacated upon condition that said defendant pay forthwith to plaintiff's attorney the costs of entering said judgment, to-wit, the sum of dollars, and that the issues in said action shall stand for trial at the present term and without other notice be placed upon and at the foot of the calendar.

Upon the payment of said costs let the proposed answer already served with the motion papers herein stand as the answer herein without further service.

[If it be deemed advisable to let the judgment stand as security to the plaintiff add]: Notwithstanding this order let the said judgment [and the execution issued thereon] stand as security for the plaintiff's claim to abide the event of the action.

By the Court:

R.... S...., Judge.

2276. Affidavit to set aside service of summons and judgment because of insufficient service.¹

[Proceed as in Form 2273 to the * and continue]:

That the summons in said action was never in fact served upon nor delivered to this defendant personally; that defendant was a resident of said county at the time of the issuance of said summons and has remained such resident continuously from that time till the present, and that his usual place of abode during all such time was and is at [name place], where he resided with his family, consisting of [name members of family]; that the summons herein was never left at said usual place of abode nor in presence of any one of his said family, but that, as defendant is informed and believes, the same was left at [name place] with one [name person] who was not a member of defendant's family [or otherwise state the facts showing that no jurisdiction was obtained].

[Jurat.]

C.... D....

[Attach corroborating affidavits.]

¹ If the return of service itself shows failure to serve the summons so as to confer jurisdiction no affidavit will be necessary, but the motion may be based on the

record. As this motion is based upon lack of jurisdiction of the court to proceed no affidavit of merits or proposed answer is necessary.

2277. Notice of special appearance and motion on foregoing affidavit.

[Title.]

SIR: Please take notice that I appear in this action for C.... D.... specially for the purpose of this motion only and for no other purposes; and that upon the summons and return thereon and upon all the papers and proceedings on file herein, and upon the affidavits of C.... D.... and J.... K.... served herewith, I shall move the court at the next regular term thereof to be had at the court house in the city of, in said county, on the ... day of, 19.., at the opening of court that day or as soon thereafter as counsel can be heard, for an order setting aside the service of the summons herein, and vacating said judgment and dismissing the action on the ground that [*here state the defect of the service*], with costs of the motion.

Dated, 19..

G.... H....,

To L.... M...., Esq.,
Plaintiff's Attorney.

Attorney for Defendant for purposes of this motion only.

2278. Order setting aside service of summons and judgment for lack of jurisdiction.

[Title.]

[Caption as in Form 7.]

The motion of the defendant C.... D.... [appearing specially for that purpose] to set aside the pretended service of the summons herein and to vacate the judgment and dismiss the action, on the ground that there was no service of summons of any kind upon said defendant, coming on to be heard upon the summons, return and all papers on file in said action, and upon the affidavit of C.... D...., and it appearing that said summons was never in fact served upon said defendant either personally or in any manner authorized by law; after hearing G.... H...., Esq., for said motion and L.... M.... in opposition thereto,

ORDERED that said motion be granted and that the pretended service of the summons herein be set aside; that the judgment heretofore entered in this action be vacated and held for naught and that the action be and is hereby dismissed with motion costs, taxed at dollars.

By the Court:

R.... S...., Judge.

2279. Affidavit to open default and defend, by defendant served by publication who received no actual notice (Wis. Stats. 1898 sec. 2833).

[Title.]

[Venue.]

C.... D...., being duly sworn, says he is the defendant in

this action and that the same was brought for the purpose [*here state object of the action*].

That on the day of, 19.., the plaintiff obtained an order for the service of the summons in this action on this defendant, among others, by publication of the same in the [*name newspaper*], and by mailing the same to this defendant, which order was in the usual form and is on file herein.

That thereafter, and on the day of, 19.., a judgment was rendered in this action and entered of record adjudging that [*state terms of the judgment so far as it affects the defendant*].

That this defendant never in fact received any copy of said summons or of the complaint, through the post office or otherwise, and said summons was not personally served on him at any time or in any manner, and that he had no notice or knowledge that said action had been brought, or was pending, until the day of, 19.., when he first learned of the commencement of this action and the rendition of the said judgment.

That defendant has fully and fairly stated the case in this action to G.... H...., his counsel, an attorney and counselor of this court, who resides at, and upon said statement thus made, is advised by said counsel that he has a valid and substantial defense to the said action, and to the whole thereof, which defense is justly and truly set forth in his verified answer to said complaint, a copy of which answer is hereto attached marked Exhibit A, and which he prays leave to file and serve herein.

WHEREFORE this defendant prays that the said judgment be set aside so far as the same affects the rights of this defendant, and that he be allowed to defend said action and serve and file his said answer on such terms as may be just, and that he have restitution of all property of this defendant which has been seized, sold or taken by virtue of said judgment, or of the value thereof, with interest, if restitution in kind can not be had.

C.... D....

[*Jurat.*]

[*Attach corroborating affidavits, if any. The notice of motion may be substantially as in Form 2274 and the order as in Form 2275, with such changes as the difference in facts may necessitate.*]

2280. Petition in action to vacate a judgment erroneously entered (Iowa Code sec. 4091).

[*Title.*]

The plaintiff herein, by this his petition, respectfully alleges:

I. That on the day of, 19.., judgment was

rendered and entered by this court in an action then and there pending wherein the above-named defendant was plaintiff, and this plaintiff was defendant, by which it was adjudged that the above-named defendant recover of this plaintiff the sum of dollars [*or otherwise state the nature of the judgment according to the fact*].

II. That said judgment was obtained by fraud practiced in obtaining the same by said A.... B.... [*plaintiff in former action*] [*or, that said judgment was obtained by erroneous proceedings against the plaintiff*], in this, that [*here state fully the fraud, error or casualty, e. g.*] this plaintiff was an infant at the time of the bringing of said former action and at the time of the rendition of said judgment and that no guardian *ad litem* was ever appointed for him in said action and no appearance or defense was made therein by him or by any guardian on his behalf.

III. That this plaintiff at the time of the rendition of said judgment had and still has a good and valid defense to the whole [*or, part*] of said judgment, which defense is as follows [*here state defense as definitely and fully as in a pleading*].

IV. [*State when the error or fraud was first discovered and the diligence used to discover same.*]

V. That a copy of the record entry of said judgment is hereto attached, made part of this petition and marked Exhibit A.

WHEREFORE the plaintiff prays that said judgment be vacated [*or modified, stating modification desired*] with costs.

G.... H....,

Attorney for Plaintiff.

[*Verification.*]

2281. Outline of complaint to set aside judgment procured by perjury or fraud (Minn. Rev. Laws 1905 sec. 4277).

[*Title.*]

The plaintiff complaining of the defendant respectfully alleges:

I. [*As in allegation I in last preceding form.*]

II. That said judgment was obtained by perjury [*or, by subornation of perjury, or, by fraudulent practice*] on the part of said A.... B.... [*plaintiff in former action*] in this [*here state fully and particularly the perjury or fraud committed and show that it was practiced by the prevailing party and that the former judgment was based thereon*].

III. That this plaintiff did not discover or know of said perjury [*or, fraud*] until on or about the day of, 19.., and thereupon [*state diligence used in commencing the present action*], and that this action was commenced on the day of

....., 19... , and within three years after the discovery by this plaintiff of said fraud *or, perjury*].

IV. That this plaintiff has suffered damages by the rendition of said former judgment in this [*state damages suffered*].

WHEREFORE the plaintiff prays that said judgment be set aside and held for naught, and that said defendant be enjoined from enforcing the same [*or demand such other relief as the statute authorizes as the case may require*].

G.... H....,
Plaintiff's Attorney.

[*Verification.*]

CHAPTER CLIII.

COSTS.

- | | |
|--|--|
| 2282. Affidavit to obtain security for costs (Wisconsin). | 2291. Bill of costs (Wisconsin). |
| 2283. Order requiring security for costs (Wisconsin). | 2292. Affidavit of disbursements to be attached to bill (Wisconsin). |
| 2284. Undertaking for security for costs (Wisconsin). | 2293. Affidavit of attendance of witnesses (Wisconsin). |
| 2285. Notice of filing security for costs (Wisconsin). | 2294. Notice of taxation of costs accompanying bill. |
| 2286. Bond as security for costs (Minnesota). | 2295. Objections to items of costs as proposed (Wisconsin). |
| 2287. Affidavit on which to move for security for costs (Iowa). | 2296. Notice of motion to review clerk's taxation (Wisconsin). |
| 2288. Motion based on last preceding affidavit (Iowa). | 2297. Order on review of clerk's taxation of costs (Wisconsin). |
| 2289. Bond for costs (Iowa). | 2298. General form of bill of costs in supreme court. |
| 2290. Affidavit for security when plaintiff or sureties become non-resident after action brought (Minnesota, North Dakota and South Dakota). | 2299. Notice of taxation accompanying bill. |

The right to recover costs is purely statutory, and hence costs can not be recovered nor security for costs required except under specific statutory provisions.

In Wisconsin the defendant may by motion require the plaintiff to give security in the cases prescribed by sections 2943-2944 Wis. Stats. 1898, and may also require additional security in case the surety remove from the state or become insufficient. *Id.* sec. 2947.

In Minnesota, a person committed for a crime, a nonresident, or a foreign corporation, must file a bond with the clerk before the service of summons, and if he fail to do so the court may stay proceedings or dismiss the action at the cost of the plaintiff's attorney. Minn. Rev. Laws 1905 secs. 4355, 4356.

In Iowa the defendant before answering may require, by motion, any plaintiff, if he be a nonresident, or a private or foreign corporation, to give security for costs, and the action will be dismissed if the bond is not given. Iowa Code secs. 3847, 3848.

In North Dakota and South Dakota a nonresident or a foreign corporation plaintiff must give resident security for costs before the action is brought, and the surety is required to indorse the

summons or sign his name on the complaint, either of which acts completes the obligation. On failure to give such security the action is to be dismissed. N. Dak. Rev. Codes secs. 5597-5599. S. Dak. Rev. Codes C. P. secs. 433-435.

Substantially the same provisions are contained in the statutes of Nebraska, except that they apply to all nonresidents of the county where the action is brought. Cobb. Ann. Stats. Nebr. secs. 1622, 1623.

The statutes regulating the costs to be recovered and the taxation thereof in ordinary cases will be found as follows: Wis. Stats. 1898 secs. 2918-2939; Minn. Rev. Laws 1905 secs. 4337-4354; N. Dak. Rev. Codes secs. 5574-5594; S. Dak. Rev. Codes C. P. secs. 410-432; Iowa Code secs. 3853-3875; Cobbe's Ann. Stats. Nebr. secs. 1630-1637.

2282. Affidavit to obtain security for costs (Wis. Stats. 1898 sec. 2945).

[*Title.*]

[*Venue.*]

C.... D...., being duly sworn, says he is the defendant [*or, one of the defendants*] in this action and that the same was commenced by service of summons on him on the day of, 19.., and that the time for answering the complaint herein has not yet expired [*or state the stage of the action, according to the fact*];

That the plaintiff is [*or, all the plaintiffs are*] and was at the time of the commencement of this action a nonresident of this state [*or state the fact which brings the plaintiff within any of the classes named in sec. 2943 Wis. Stats. 1898*];

[*Or if the plaintiff has become a nonresident, or sentenced to state prison for a term less than life after commencement of the action, insert*]: That since the commencement of this action the plaintiff has become and is now a nonresident of this state [*or, has been sentenced to the state prison of this state for a term less than for life*];

That no security for costs has been filed in this action and this affidavit is made for the purpose of compelling the filing of such security.

C.... D....

[*Jurat.*]

2283. Order requiring security for costs (Wis. Stats. 1898 sec. 2945).

[*Title.*]

On reading and filing the affidavit of C.... D...., defendant herein, from which it appears that [*state the facts which*

entitle the defendant to security], and on motion of G.... H...., Esq., defendant's attorney,

ORDERED that the plaintiff be and he is required to file security for costs in the sum of dollars within twenty days after the service upon him of a copy of this order; and that all proceedings herein on the part of the plaintiff be stayed, until such security be filed.

Dated, 19..

R.... S....,
Circuit Judge.

[This order may be made by the court or judge without notice; the sum is to be fixed by the officer making the order, not less than two hundred and fifty dollars.]

2284. Undertaking for security for costs (Wis. Stats. 1898 sec. 2946).

[Title.]

Whereas, this action has been commenced by said plaintiff in said court and the plaintiff has been required to give security for costs therein;

Now, we, N.... O.... of, and O.... P.... of, both of said county, do hereby undertake in the sum of dollars, that the plaintiff will pay on demand all costs that may be awarded to the defendant in said action in any court, not exceeding the sum aforesaid.

Dated at the day of, 19..

N.... O....
O.... P....

[Venue.]

N.... O.... and O.... P...., being each duly sworn, on oath, each for himself says that he has signed the foregoing undertaking, that his residence is truly stated therein and that he is worth the sum of dollars over and above all his debts and liabilities, in property within this state, not by law exempt from execution.

N.... O....
O.... P....

[Jurat.]

2285. Notice of filing security for costs (Wis. Stats. 1898 sec. 2946).

[Title.]

To C.... D...., the defendant above named:

Pursuant to the order made on the day of, 19.., in the above entitled action, requiring the above named plaintiff

to file security for costs herein, and staying proceedings on the part of said plaintiff until the same be filed,

Take notice, that the said plaintiff has filed with the clerk of the court of county, an undertaking [of which a copy is herewith served upon you] with two sufficient sureties, to the effect that the said plaintiff will pay on demand all costs that may be awarded to said defendant in such action, in any court, not exceeding dollars, the sum mentioned in said order.

Dated, 19..

E.... F....,
Plaintiff's Attorney.

2286. Bond as security for costs (Minn. Rev. Laws 1905 secs. 4355, 4523, 4524).

STATE OF MINNESOTA, }
County of } ss.

District Court,
..... Judicial District.

A..... B....., }
Plaintiff, }
vs. }
C..... D....., }
Defendant. }

KNOW ALL MEN by these presents, that we, A.... B.... as principal, and N.... O.... of and O.... P.... of, both of the county of in said state of Minnesota, as sureties, are held and firmly bound unto L.... M...., Esq., clerk of the district court of county, in said state, in the sum of seventy-five dollars, lawful money of the United States, to be paid unto the said L.... M...., clerk as aforesaid, his successors in office or assigns, for which payment well and truly to be made we jointly and severally bind ourselves, and each of our heirs, executors and administrators, firmly by these presents.

Sealed with our seals and dated this day of, 19..

THE CONDITION of this obligation is such that whereas the said A.... B.... is about to commence an action in said court against the said C.... D.... entitled as above and to make service of the summons in said action on the said C.... D....,

Now, therefore, if the said A.... B.... shall well and truly pay to the said C.... D.... all costs and disbursements that may be adjudged against him, the said A.... B...., in said action, then this obligation shall be void; otherwise of force.

IN TESTIMONY whereof we have hereunto set our hands and seals this day of, 19..

In presence of [*two witnesses*].

A.... B.... [Seal]

N.... O.... [Seal]

O.... P.... [Seal]

[*Venue.*]

On this day of, 19.., before me, a notary public within and for said county, personally appeared A.... B...., N.... O.... and O.... P...., to me known to be the persons described in and who executed the within instrument, and acknowledged that they executed the same as their free act and deed.

Q.... R....

Notary Public,
..... County, Minn.

[*Venue.*]

N.... O.... and O.... P.... being duly sworn, each for himself says, that he is one of the sureties within named; that he is a resident and freeholder of the state of Minnesota, and worth the amount of one hundred and fifty dollars [*each surety must state that he is worth double the amount for which he justifies*] above his debts and liabilities, and exclusive of his property exempt from execution.

N.... O....

O.... P....

[*Jurat.*]

[*Approval to be indorsed on the outside as follows*]: I hereby approve the within bond and the sureties therein contained this day of, 19..

R.... S....,
Judge.

2287. Affidavit on which to move for security for costs (Iowa Code sec. 3847).

[*Title.*]

[*Venue.*]

C.... D...., being duly sworn, says that he is the defendant in the above entitled action which was commenced on the day of, 19..; that he has a good defense to the whole of said action [*or, if only to a part, state specifically to what part*]; that the plaintiff was at the time of the commencement of this action and still is a nonresident of this state *or* a private *or* foreign corporation] and has not given security for costs in said

action. That defendant has not yet answered in said action and that the time for answering has not yet expired.

[*Jurat.*]

C.... D....

2288. Motion based on last preceding affidavit (Iowa).

[*Title.*]

Now comes the said defendant C.... D.... and moves the court upon the affidavit of said C.... D.... for an order requiring the said plaintiff to give security for costs in said action [*or, additional security for costs in said action, as the case may be*] for the reason that [*state reason*].

G.... H....,

Attorney for Defendant.

2289. Bond for costs (Iowa Code sec. 3847).

[*Title.*]

KNOW ALL MEN by these presents, that we, A.... B...., principal, and N.... O...., surety, are held and firmly bound unto C.... D...., in the sum of dollars, lawful money of the United States, well and truly to be paid to the said C.... D...., his heirs, executors and assigns, for which payment we jointly and severally bind our heirs, executors and administrators firmly by these presents.

Dated this day of, 19..

THE CONDITION of the above obligation is such that, whereas, on the day of, 19.., the said A.... B.... commenced an action in the district court of county, Iowa, against the said C.... D...., and whereas, said plaintiff is a nonresident of this state [*or a private or foreign corporation, as the case may be*], and the said defendant has filed his affidavit in the said action, stating that he has a good defense thereto [*or to some part of said action, stating it*];

Now, if the said A.... B.... shall well and truly pay the costs which may accrue in said action, in this court, or in any other court to which the same may be carried, either to said defendant or to the officers of the court, then this obligation to be void, otherwise to remain in full force and virtue.

A.... B...., Principal.

N.... O...., Surety.

[*Add justification and approval by the clerk as in Form 257.*]

2290. Affidavit for security when plaintiff or sureties become non-resident after action brought (Minnesota, North Dakota, South Dakota).

[*Title.*]

[*Venue.*]

C.... D...., being duly sworn, says that he is the defendant

above named and that this action was commenced by said plaintiff in this court on the day of, 19..

That since the commencement of this action and on or about the day of, 19.., the said plaintiff removed from this state, and became and still is a resident of the state of, [or *allege the giving of security by the plaintiff and that the surety or sureties have since removed from the state or become insolvent*].

C.... D....

[*Jurat.*]

[*This affidavit to be accompanied by notice of motion or order to show cause in the usual form.*]

2291. Bill of costs (Wis. Stats. 1898 sec. 2921).¹

[*Title.*]

BILL OF COSTS.

Retainer	\$3 00
Brief and copies	3 00
Draft summons	folios, 25c. each..
Eng...keep...serve	12c. each..
Draft complaint.....	25c. each..
Eng...copies...keep...serve....	12c. each..
Draft reply.....	25c. each..
Eng...copies...keep...serve....	12c. each..
Draft answer	25c. each..
Eng...copies...keep...serve....	12c. each..
Draft notice of trial	25c. each..
Eng...copies...keep...serve....	12c. each..
Attending trial days, at \$3 per day.....	
Drawing finding	folios, 25c. each..
Eng...copies...keep	12c. each..
Drawing exceptions to.....	25c. each..
Eng...copies...keep	12c. each..
Drawing judgment	25c. each..
Eng...copies...keep	12c. each..
Draft bill of costs.....	25c. each..

¹ This form is specially adapted to the Wisconsin statutes, and will not be applicable to the other states covered by this work where attorney's fees are not taxed by items but allowed in fixed amounts according to the amount of the recovery or the stage of the case. The six forms immedi-

ately following are also adapted to the Wisconsin practice, but may be used, with appropriate variations, as indicated by the statutes in other states. As printed forms are in general use for taxation of costs it is not deemed necessary to insert further special forms for each state.

Eng....copies....keep....serve.... ..	12c. each..
Draft affidavit of disbursements.... ..	25c. each..
Eng....copies....keep....serve.... ..	12c. each..
Draft notice of taxation of costs..... ..	25c. each..
Eng....copies....keep....serve.... ..	12c. each..
....term fees at \$2 each	
....motions at 62½ cents each	
Attendance on examination of witnesses out of court....	
Attendance on judge out of term, on special motion.....	\$0 50
Attendance on striking jury	
Arguing demurrer	
[Insert other items if any.]	

DISBURSEMENTS.

State tax	\$1 00
.... affidavits at 25 cents each	
Sheriff's fees, service of summons.....	
Sheriff's fees, service of subpoenas	
Clerk's fees	
Register's fees	
Postage and telegraphing	
Abstract	
Jury fee	3 00
Commissioner's fees	
Witness fees	

The above costs and disbursements are hereby adjusted, taxed and allowed this day of, 19..

L.... M....,
Clerk.

2292. Affidavit of disbursements to be attached to bill (Wis. Stats. 1898 sec. 2928).

[Venue.]

A.... B...., being duly sworn, says that he is the plaintiff [or, the attorney for the plaintiff] in the within entitled action, and that all of the disbursements above mentioned have been necessarily made or incurred, and that the copies named in the foregoing account were actually and necessarily used [or necessarily obtained for use] in said action. A.... B....

[Jurat.]

2293. Affidavit of attendance of witnesses (Wis. Stats. 1898 sec. 2928).

[Venue.]

A.... B...., being duly sworn, on oath says that he is the plaintiff in the within entitled action; that L.... M...., N....

O.... and [*name all witnesses*] were subpoenaed as witnesses on the part of the plaintiff in said action, and that said witnesses were necessarily in attendance on the trial of said action the number of days, and resided at the places and traveled the number of miles from their respective places of residence to attend the trial of said action as hereinafter stated and set opposite their respective names, to-wit:

L.... M.... resides at, attended days, and traveled miles, and is entitled to \$.....

N.... O.... resides at, attended days, and traveled miles, and is entitled to \$.....

A.... B....

[*Jurat.*]

2294. Notice of taxation of costs accompanying bill.

To G.... H...., Esq., Attorney for Defendant.

Please take notice that on the day of, 19..., at o'clock ..M., the undersigned will apply to the clerk of the circuit court, for county, at his office in the city of, county of, state of Wisconsin, to have the within bill of costs and disbursements in the within entitled action taxed, adjusted and allowed, and the amount thereof inserted in the entry of judgment in the within entitled action.

E.... F....,
Attorney for Plaintiff.

2295. Objections to items of costs as proposed (Wisconsin).

[*Title.*]

Now comes the said defendant and objects to the following items in the proposed bill of costs of the plaintiff as follows:

1. To the item of [*here specify the same*], because excessive.
2. To the item of disbursements, \$...., for [*specify what*], because unnecessary and unreasonable in amount.
3. To the item of disbursement, \$...., for [*specify what*] because the same was not actually incurred [*as shown by accompanying affidavit*].
4. [*Specify other objections, naming each item objected to.*]

[*Date.*]

G.... H....,
Attorney for Defendant.

[*If objections are based on the fact that any certain items of disbursements were not in fact incurred or paid the objections should be accompanied by affidavits showing the fact.*]

2296. Notice of motion to review clerk's taxation (Wisconsin).

[Title.]

To E.... F...., Esq., Plaintiff's Attorney.

Please take notice that the [defendant], being aggrieved by the taxation of costs in this action, by the clerk of said court, will, upon the bill of costs and disbursements, the objections thereto, the affidavits of C.... D.... and L.... M.... and the record and papers and vouchers on file in said action, move the court, on the day of, 19.., at the court house at, in county, at the opening of court on that day or as soon thereafter as counsel can be heard, to review said taxation of costs. The defendant is aggrieved by the action of the taxing officers in the following respects:

[Here state each item in respect to which review is desired.]

And the defendant will ask that said items and each of them be disallowed and the taxation there be reversed, and for such other relief, with the costs of this motion, as may be just and equitable.

[Date.]

G.... H....,
Defendant's Attorney.

2297. Order on review of clerk's taxation of costs (Wisconsin).

[Title.]

[Caption as in Form 7.]

The motion of the defendant for a review of the taxation of costs by the clerk herein coming on to be heard this day at said term, on the bill of costs and disbursements as taxed and allowed by the clerk, the written objections thereto by the defendant, and the affidavits of C.... D.... and L.... M.... and the record, papers and vouchers on file in said action, after hearing G.... H...., Esq., attorney for the [defendant] for the motion, and E.... F...., Esq., attorney for the plaintiff,

ORDERED that the clerk retax and adjust the costs herein, and on such retaxation that he strike out the following items allowed [*here specify items*]:

That he reduce the item [*specify item*] to the sum of \$....

[*State further changes to be made.*]

That he insert in the judgment the amount of costs after such retaxation and readjustment.

That the defendant have \$10, the costs of this motion, to be

* If it is desired to review the taxation of costs upon appeal, exception should be preserved to the court's action and the whole pro-

ceedings for taxation, with exceptions to the rulings, should be incorporated in the bill of exceptions.

set off and deducted from the sum of the bill of costs taxed to the plaintiff as herein directed.

By the Court:

R.... S....,

Circuit Judge.

2298. General form of bill of costs in supreme court.

[*Title.*]

Bill of Costs and Disbursements.

Statutory Costs	\$25 00
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DISBURSEMENTS.

Clerk's Fees [to be taxed]	\$.....
.... Affidavits	\$.....
Printer's Fee, Printing Case [<i>or</i> , Paper Book]	\$.....
Printer's Fee, Printing Brief	\$.....
Fees for Return to Supreme Court	\$.....
Stenographer for Transcript of Evidence	\$.....

[*Add other items if any.*]

The above Bill of Costs and Disbursements taxed and

allowed this day of, 19.., at..... \$.....

C.... K....,

Clerk of Supreme Court of

[*Venue.*]

G.... H...., being first duly sworn, deposes and says, that he is the attorney for the defendant and appellant in the above entitled action; that the foregoing is a true and correct statement of the costs and disbursements of said appellant in said action in this court, and that all of the items of such disbursements have been actually and necessarily paid or incurred therein, by and on behalf of said appellant.

[*Jurat.*]

G.... H....

2299. Notice of taxation accompanying bill.

[*Title.*]

To E.... F...., Esq., Attorney for said respondent.

Take notice, that the within bill of costs and disbursements of the appellant in the above entitled action will be presented to Q.... R...., Esq., clerk of the supreme court of, at his office in the capitol, at, on the day of, 19.., at o'clock in the noon of said day, and that the undersigned will apply to said clerk for taxation and allowance of the same, and that the amount thereof be inserted in the entry of judgment herein.

[*Date.*]

G.... H....,

Attorney for Appellant.

PART VII.

FORMS OF EXECUTIONS, SUPPLEMEN-
TARY PROCEEDINGS, APPEALS, AND
EXTRAORDINARY REMEDIES.

CHAPTER CLIV.

EXECUTIONS AND OTHER PROCEEDINGS FOR THE ENFORCEMENT OF JUDGMENTS.

2300. Execution against property (Wisconsin, Minnesota, North Dakota and South Dakota).
2301. Execution on judgment for joint debt where all defendants were not served (Wisconsin).
2302. Execution against the person (Wisconsin, North Dakota and South Dakota).
2303. Execution directing sale of real property attached in the action (Wisconsin and Minnesota).
2304. Execution to enforce lien on specific property (Wisconsin).
2305. Execution to enforce judgment lien on logs and timber (Wisconsin).
2306. Execution against property in hands of personal representatives.
2307. Execution for the delivery of specific personal or real property.
2308. Indorsement on execution in replevin against principal and sureties (Wisconsin).
2309. Affidavit for leave to issue execution after five years (Wisconsin and South Dakota).
2310. Notice of motion thereon (Wisconsin and South Dakota).
2311. Sheriff's notice of levy on personal property (North Dakota and South Dakota).
2312. Special execution on mechanic's lien judgment (North Dakota and South Dakota).
2313. Affidavit for issuance of execution on Sunday (Iowa).
2314. General form of execution on recovery of judgment (Iowa).
2315. The same (Nebraska).
2316. Indemnifying bond (Iowa).
2317. Bond staying execution (Iowa and Nebraska).
2318. Bond staying execution (Minnesota).
2319. Notice by sheriff to party to appoint appraisers of personalty (Iowa).
2320. Appraisal of personal property (Iowa).
2321. Appraisal of real property by sheriff and appraisers (Nebraska).
2322. Affidavit for exemption of personal property (Nebraska).
2323. Petition for writ of assistance after execution sale (Wisconsin).
2324. The same, after foreclosure sale.
2325. Notice on motion of foregoing petition (Wisconsin).
2326. Order granting writ of assistance (Wisconsin).
2327. Writ of assistance for land sold on execution (Wisconsin).
2328. Writ of assistance for land sold on mortgage foreclosure.

2300. Execution against property (Wis. Stats. 1898 sec. 2969; Minn. Rev. Laws 1905 sec. 4290; N. Dak. Rev. Codes sec. 5505; S. Dak. Rev. Codes C. P. sec. 334).

The State of,

To the Sheriff of the County of,

GREETING: Whereas, judgment was rendered on the day of, 19.., in an action in the court for county, between A.... B...., plaintiff, and C.... D...., defendant, in favor of said plaintiff, and against said defendant, for the sum of dollars, damages and costs, as appears by the judgment roll filed in the office of the clerk of said court, in said county of;

And whereas, the said judgment was docketed in your county on the day of, 19.., and the sum of dollars is now actually due and unpaid thereon, besides interest;

THEREFORE we command you, that you satisfy the said judgment with interest [*in North Dakota and South Dakota insert and accruing costs*] out of * the personal property of the said judgment debtor within your county, or, if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor ** on the day when the said judgment was so docketed in your county, or at any time thereafter [*in Minnesota insert here, not exceeding ten years*], in whose hands soever the same be, and return this execution within sixty days after its receipt by you, to the clerk of the court of said county of

Witness, the Hon. J.... K....,

[SEAL OF COURT.] judge of said court, at, in said county, the day of, 19..

Attest:

L.... M...., Clerk.

E.... F....,

Plaintiff's Attorney.

[*Indorsement thereon by attorney of judgment creditor*]:

To the Sheriff of County.

Levy and collect as within directed:

Damages and costs	\$.....
Interest thereon from, 19..	
Subsequent costs	
For this execution	
Your fees and percentage	

E.... F....

Plaintiff's Attorney.

[*The officer should indorse thereon the date of receipt of the writ.*]

2301. Execution on judgment for joint debt when some defendants were not served. (Wisconsin).

[*As in last preceding form inserting between the * and the ** the following*]: the joint personal property of all of the defendants and the separate personal property of the defendant C.... D.... [*defendant served*] within your county, or if sufficient personal property cannot be found then out of the real property in your county belonging jointly to all the defendants or separately to the defendant C.... D.... [*conclude as in last form*].

[*In Minnesota the execution in this case issues in form against all the defendants but the execution creditor or his attorney is required to indorse thereon the names of the defendants not served and it cannot be levied on the sole property of any such defendant. Minn. Rev. Laws 1905 sec. 4290 subd. 4.*]

2302. Execution against the person (Wisconsin, North Dakota and South Dakota).

[*As in Form 2300 to the end of second paragraph and continue as follows*]:

And, whereas, an execution against the property of the said C.... D.... has been duly issued to you [*or, to the sheriff of county*] and returned unsatisfied,

THEREFORE we command you that you arrest the said C.... D.... and commit him to the common jail of your county until he shall pay the said judgment or be thence discharged according to law; and make due return of this writ.

Witness, etc. [*as in Form 2300*].

2303. Execution directing sale of real property attached in the action (Wis. Stats. 1898 sec. 2969 subd. 2; Minn. Rev. Laws 1905 sec. 4290 subd. 2).

[*Proceed as in Form 2300 to the end of second paragraph, and continue as follows*]:

And whereas, the following described real property of said defendant was duly attached in this action on the day of, 19.., under a warrant of attachment theretofore issued herein, to-wit [*describe property*].

[*In Minnesota insert, if the judgment creditor has paid taxes on the attached property after the attachment levy*]: And whereas, it appears that the said A.... B...., on the day of, 19.., paid certain taxes upon said real estate amounting to dollars, and on the day of, 19.., filed with the clerk of this court the receipt for the taxes so paid, dated, 19.., for the amount last aforesaid, which receipt is attached to the judgment roll herein;

THEREFORE we command you that you satisfy the said judgment with interest [*and taxes so paid*] out of the personal property of said judgment debtor within your county, or if sufficient personal property can not be found, then that you sell all of the interest which the defendant had in such real estate at the time it was so attached or at any time hereafter [*in Minnesota insert instead*, or at any time after the entry of judgment, not exceeding ten years], and return this execution within sixty days, etc. [*conclude as in Form 2300*].

2304. Execution to enforce lien on specific property (Wis. Stats. 1898 sec. 2969 subd. 3).¹

[*Proceed as in Form 2300 to the end of second paragraph and continue as follows*]:

And whereas, the said judgment was adjudged to be a lien upon the interest of the said C.... D.... in and to the following described real estate [*describe same*] [*or*, upon the following described personal property, *describing same*], which said C.... D.... had on the day of, 19..,

NOW, THEREFORE, we command you that you satisfy the said judgment with interest and costs of sale by selling all the interest which the said C.... D.... had in and to said premises and real estate [*or*, in and to said personal property above described], at the time such lien attached thereto, to-wit, the day of, 19.., in whosoever hands the same may be, and that if said property so sold be insufficient to satisfy said judgment that you satisfy the said deficiency out of the personal property of said C.... D.... within your county, and if sufficient personal property can not be found then out of the real property in your county belonging to said C.... D.... on the day when said judgment was so docketed in your county or at any time thereafter in whose hands soever the same may be and return this execution, etc. [*concluding as in Form 2300*].

2305. Execution to enforce judgment lien on logs and timber (Wis. Stats. 1898 sec. 3340).

[*Proceed as in last form to the command and continue*]:

NOW, THEREFORE, we command you that you sell said logs and timber above described or so much thereof as may be necessary to satisfy said judgment and attorney's fees and costs of sale, and that if said property so subject to lien be insufficient

¹ This execution is not to be used to enforce mechanics' liens on real property, as they are enforced by direction in the judg-

ment, but it applies to other liens on specific property, except log liens for which see following form.

then that you satisfy the said deficiency out of the personal property of said C.... D...., etc. [*continue as in last preceding form*].

2306. Execution against property in the hands of personal representatives (Wis. Stats. 1898 sec. 2969 subd. 4; Minn. Rev. Laws 1905 sec. 4290 subd. 3; Iowa Code sec. 3961; N. Dak. Rev. Codes sec. 5505 subd. 2; S. Dak. Rev. Codes C. P. sec. 334 subd. 2).²

The State of,

To the Sheriff of County,

GREETING: Whereas, judgment was rendered on the day of, 19.., in an action in the court for county, between A.... B...., plaintiff, and C.... D...., defendant, as the administrators of the estate of E.... F...., deceased, in favor of said A.... B...., and against said defendants, as such administrators, for the sum of dollars, as appears by the judgment roll filed in the office of the clerk of said court, in said county of

And whereas, the said judgment was docketed in your county on the day of, 19.., and the sum of dollars is now actually due and unpaid, besides interest.

THEREFORE, we command you that you satisfy the said judgment out of the personal property belonging to the estate of said E.... F...., deceased, in the hands of said defendants as administrators of said estate and return this execution, etc. [*conclude as in Form 2300*].

2307. Execution for the delivery of specific personal or real property (Wis. Stats. 1898 sec. 2969 subd. 6; Minn. Rev. Laws 1905 sec. 4290 subd. 5; Iowa Code sec. 3962; N. Dak. Rev. Codes sec. 5505 subd. 4; S. Dak. Rev. Code C. P. sec. 334 subd. 4).

The State of,

To the Sheriff of County,

GREETING: Whereas, judgment was rendered on the day of, 19.., in the court for county, in an action between A.... B...., plaintiff, and C.... D...., defendant, in favor of A.... B...., plaintiff, and against C.... D...., defendant, for the delivery to the said plaintiff of the possession of the following described personal property, to-wit [*describe same*], or, if a delivery thereof can not be had, then for dollars, the value thereof duly assessed, and also

² If the property be in the hands of trustees, this form may be easily varied to meet the case.

for the sum of dollars, damages and costs [or, the following described real property, *describing same*, and also for the sum of dollars costs, damages, rents and profits] as appears by the judgment roll filed in the office of the clerk of said court of said county of

And whereas, the said judgment was docketed in your county on the day of, 19.., and the sum of dollars is now actually due and unpaid thereon, with interest [and dollars additional, with interest, as aforesaid, in case a delivery can not be had].

THEREFORE, we command you that you deliver the said property to the said A.... B.... and that you satisfy the said sum of dollars with interest as aforesaid [*in case of personal property add*, and also in case a delivery of said personal property can not be had the further sum of dollars with interest as aforesaid] out of the personal property of the said judgment debtor in your county or if sufficient personal property can not be had then out of the real property in your county belonging to said judgment debtor on the day when such judgment was so docketed in your county or at any time thereafter [*in Minnesota, not exceeding ten years*] in whose hands soever the same may be and return this execution, etc. [*as in Form 2300*].

2308. Indorsement on execution in replevin against principal and sureties (Wis. Stats. 1898 sec. 2969 subd. 6 and secs. 2889 and 3771).

To the Sheriff of County.

Levy as within directed dollars with interest thereon from, 19.., besides your fees, of the defendant, C.... D...., and if you can not find sufficient property of the said C.... D.... to satisfy the same levy and collect the whole or the part so remaining unsatisfied of the property of L.... M.... and N.... O.... [*sureties*].

[*Date.*]

E.... F....,
Plaintiff's Attorney.

2309. Affidavit for leave to issue execution after five years (Wis. Stats. 1898 sec. 2968; S. Dak. Rev. Codes C. P. sec. 329).

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that final judgment was rendered in said action in favor of the plaintiff and against the defendant for the sum of dollars damages and

costs on the day of, 19.., as more fully appears from the record of said judgment, and that no execution has ever been issued on said judgment and more than five years have elapsed since the rendition thereof.

That no part of said judgment has been paid [except the sum of dollars on the day of, 19..], and that the sum of dollars with interest from, 19.., is still due and unsatisfied thereon.

E.... F....

[*Jurat.*]

2310. Notice of motion thereon (Wisconsin and South Dakota).

[*Title.*]

To C.... D...., defendant above named, and G.... H...., Esq., his Attorney.

TAKE NOTICE that on the affidavit of E.... F.... a copy of which is served herewith and upon the judgment roll herein the undersigned will move the court of county [or, the Hon. J.... K...., circuit judge] at on the day of, 19.., at o'clock in the noon of said day, for an order granting leave to issue execution in the above-entitled action.

[*Date.*]

E.... F....

[In South Dakota this notice must be personally served on the judgment debtor if to be found within the jurisdiction, or if not found, by publication or in such other manner as the court may direct. S. Dak. Rev. Codes C. P. sec. 329.]

2311. Sheriff's notice of levy on personal property (N. Dak. Rev. Code sec. 5525; S. Dak. Rev. Code C. P. sec. 360).

State of, County of to C.... D.... :

TAKE NOTICE, that I have this day, by virtue of an execution issued out of the court, ... county, upon a judgment in a certain action in said court wherein A.... B.... is plaintiff, and you are the defendant, levied on all personal property, chattels, moneys and real estate belonging to you, to-wit [*here give list and description of property*], said personal property, chattels, moneys and real estate being held and situate in the county of and state of, in section, township N., range W., town of

Given under my hand this day of, 19..

L.... M....,
Sheriff of County.

2312. Special execution on mechanic's lien judgment (N. Dak. Rev. Codes sec. 5501; S. Dak. Rev. Codes C. P. sec. 330).

[*Title.*]

The State of, to the Sheriff of County,

GREETING: Whereas, on the . . . day of, 19. . ., the plaintiff, A. . . . B. . . ., recovered a judgment in the above entitled action, whereby it was adjudged that there was then due to the plaintiff from the defendant, C. . . . D. . . ., on the contract and claim for a mechanic's lien mentioned and described in the complaint, the sum of dollars, besides the sum of dollars costs and disbursements at the date of said judgment, and whereby it was further established and adjudged that the plaintiff possessed a mechanic's lien for the amount so adjudged to be due the plaintiff, with costs and disbursements as aforesaid, upon the following described premises, to-wit [*insert description*], and that said premises be sold to satisfy said lien and costs;

THEREFORE, we command you that you execute said judgment by making sale of said premises herein above described, or so much thereof as may be necessary to satisfy said sums so adjudged to be due to the plaintiff, with interest thereon from the date of said judgment, together with costs and expenses of sale, in accordance with the requirements of said judgment, and apply the funds realized on said sale in conformity therewith, and make the return of this writ to the clerk of said court.

Witness, etc. [*as in Form 2300*].

2313. Affidavit for issuance of execution on Sunday (Iowa Code sec. 3956).

[*Title.*]

[*Venue.*]

A. . . . B. . . ., being duly sworn, says that he is the plaintiff in the above entitled action and that judgment was rendered therein in favor of the plaintiff and against the defendant on the . . . day of, 19. . ., and that said judgment remains wholly unsatisfied [*or, unsatisfied as to the sum of dollars*]; that affiant verily believes that he will lose his said judgment unless process by execution issue on this . . . day of, 19. . ., being Sunday.

[*Jurat.*]

A. . . . B. . . .

2314. General form of execution on recovery of judgment (Iowa Code sec. 3960).

[*Proceed as in Form 2300 to the end of second paragraph and continue*]:

THEREFORE we command you that * you satisfy the said

judgment, and interest thereon at per cent. per annum from, 19.., together with the accruing costs of levy and sale under this court, out of the property of the said C.... D.... in your county subject to execution, and that you make due service of this writ and return the same to this court within seventy days from the date hereof.

Witness, etc. [*as in Form 2300*].

2315. The same (Cobb. Ann. Stats. Nebr. sec. 1481).

[*Proceed as in last preceding form to the * and continue*]: of the goods and chattels of the said C.... D.... you cause to be made the said sum of dollars [*amount due on the judgment*] with interest from, 19.., and costs of levy and sale, and that for want of goods and chattels you cause the same to be made of the lands and tenements of the said C.... D...., and that you make due return to this court of this writ and your doings thereunder.

Witness, etc. [*as in Form 2300*].

2316. Indemnifying bond (Iowa Code secs. 3991, 3992)

[*Proceed as in Form 2289, making the sheriff the obligee to the condition, and continue*]:

THE CONDITION of this obligation is such that whereas, the said L.... M...., sheriff as aforesaid, has in his hands to be executed a certain writ of execution to him directed, issued from the office of the clerk of the court of county, Iowa, on a judgment rendered in said court on the day of, 19.., for the sum of dollars damages, and dollars costs, in favor of the said A.... B.... and against the said C.... D....

Now, if said obligors shall and will indemnify the said L.... M.... against all damages which he may sustain in consequence of the seizure or sale on said writ of the following described personal property, to-wit [*describe property*], and will pay to any claimant of said property the damages he may sustain in consequence of the said seizure or sale thereof, and will warrant to the purchaser thereof at such sale, such estate or interest therein as is sold at said sale, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this day of, 19..

A.... B...., Principal.

R.... S...., Surety.

[*Approval thereon*]: The within bond and the surety [*or, sureties*] therein approved by me this day of, 19..

L.... M....,

Sheriff, ... County. Iowa.

2317. Bond staying execution (Iowa Code sec. 3996; Cobb. Ann. Stats. Nebr. sec. 1470).

[Title.]

We, O.... P.... and R.... S...., of county, of , state of , hereby acknowledge ourselves security for the above named defendant for the payment of that certain judgment rendered in the above named court in this action , 19.. , in favor of the plaintiff and against the defendant for the sum of dollars for the purpose of a stay of execution on said judgment for the term of months, and we hereby bind ourselves jointly and severally to pay the said judgment with interest and accruing costs at or before the expiration of said months, and in default thereof at the expiration of said stay we authorize the clerk of said court to issue execution against us as provided by law.

[Date.]

O.... P....
R.... S....

[Venue.]

O.... P.... and R.... S...., being each duly sworn, each for himself says that he is a resident and freeholder of the state of and that he owns property in this state not exempt from execution, and aside from incumbrance thereon, to the value of dollars [*total sum must be twice the amount of the judgment*].

O.... P....
R.... S....

[Jurat.]

[Approval thereon]: The within bond and the sureties thereon approved by me this day of , 19..

J.... K....,
Clerk.**2318. Bond staying execution (Minn. Rev. Laws 1905 sec. 4316).**

[Title.]

[Proceed as in Form 2286, making the judgment creditor the obligee to the condition, and continue]:

THE CONDITION of this obligation is such that whereas judgment was recovered by the above named plaintiff against the above named defendant [*describe same and give date and amount*]; and whereas the said C.... D.... is desirous of obtaining a stay of execution upon said judgment,

Now, therefore, if the said C.... D.... shall well and truly pay to the said A.... B.... the amount of said judgment with interest at the rate of eight per cent. per annum during the

time for which such stay is granted, then this obligation shall be void; otherwise of force.

IN TESTIMONY whereof, etc. [*conclude with acknowledgment and justification as in Form 2286, with approval by the court*].

2319. Notice by sheriff to party to appoint appraisers of personalty (Iowa Code sec. 4041).

[*Title.*]

To the said A.... B.... and C.... D.... :

You are hereby notified that by virtue of an execution issued in the above entitled action out of the court of county, and to me directed, I have levied on and seized the following personal property as the property of said C.... D.... [*describe property*], and that each of you is required to choose an appraiser to value said property, if you deem proper, according to law.

[*Date.*]

L.... M....,

Sheriff, ... County, Iowa.

2320. Appraisal of personal property (Iowa Code sec. 4041).

[*Title.*]

[*Venue.*]

We, the undersigned appraisers, householders of said county, selected to value the property hereafter described, which was levied upon by L.... M...., sheriff of county, ..., by virtue of an execution issued out of the clerk's office of the court in the above entitled action and against the property of C.... D...., do hereby report that we have valued said property according to the fair value thereof at this time, namely:

[*Name each article and give value.*]

Dated this day of, 19..

O.... P...., {
N.... O...., } Appraisers.

[*Venue.*]

N.... O.... and O.... P...., being each duly sworn, each for himself says that the foregoing is a just and true appraisal of the property therein described and of each article thereof at the present time as he verily believes.

N.... O....

[*Jurat.*]

O.... P....

2321. Appraisal of real property by sheriff and appraisers (Cobb. Ann. Stats. Nebr. secs. 1490, 1491).

[*Title.*]

[*Venue.*]

We, L.... M...., sheriff of county, Nebraska, and N.... O.... and O.... P...., two disinterested freeholders

in and residents of said county, said N.... O.... and O.... P.... having been first duly sworn by said sheriff impartially to appraise the interest of said C.... D.... [*judgment debtor*] in the property hereinafter described, do, upon actual view thereof, appraise the property hereinafter described, at its real value in money, the same being the property to be sold under and by virtue of a judgment and execution thereon issued out of the district court of the judicial district of Nebraska, in and for the county of in the above entitled action wherein A.... B.... is plaintiff and C.... D.... is defendant, to-wit [*describe property*], at the sum of dollars.

The following is a statement of the prior incumbrances on said premises:

Taxes, as per city and county treasurers' certificate, attached hereto	\$.....
Mortgages, as per register of deed's certificate, at- tached hereto	\$.....
Mechanic's liens, as per register of deed's certificate, attached hereto	\$.....
Prior judgments, as per district court clerk's certi- ficate, attached hereto	\$.....

Total incumbrances \$.....

The interest of C.... D.... defendant in said property over and above said incumbrances we value at dollars.

Given under our hands this day of, 19..

L.... M....,

Sheriff of County, Neb.

N.... O....

O.... P....,

[*Sheriff's certificate*]: I hereby certify that the above named N.... O.... and O.... P.... are freeholders in and residents of county, Nebraska, and that they were by me duly summoned and sworn to make the appraisement as above set forth, on the day and year last above written.

L.... M....,

Sheriff of County, Neb.

2322. Affidavit for exemption of personal property (Cobb. Ann. Stats. Nebr. secs. 1522, 1523).

[*Title.*]

[*Venue.*]

I, C.... D...., the above named defendant, do solemnly swear, on oath, that I am a resident of the state of Nebraska, and the head of a family consisting of [*name members of family*];

that I have neither lands, town lots nor houses subject to exemption as a homestead under the laws of this state, and that the following inventory contains a true and correct list of the whole of the personal property owned by me, to-wit [*name each article*]

C.... D....

[*Jurat.*]

[*Venue.*]

We, the undersigned, three disinterested freeholders of said county, being first duly sworn by L.... M.... of said county, to appraise the personal property of C.... D...., the defendant above named, at its cash value, do hereby appraise said property, being the property described in the foregoing inventory, as follows [*name each article and give its appraised value*].

This does not include the value of such articles as are specifically exempt by statute.

N....	O....,	} Appraisers.
O....	P....,	
Q....	R....,	

2323. Petition for writ of assistance after execution sale (Wis. Stats. 1898 sec. 3025).

[*Title.*]

To the Court of the County of [*or, to Hon. R.... S...., Circuit Judge of the County of*].

THE PETITION of A.... B.... of respectfully shows:

That on the day of, 19.., in the circuit court for county, in an action then pending, wherein A.... B.... was plaintiff, and C.... D.... was defendant, it was adjudged [*state fully the terms of the judgment*];

That execution upon said judgment was thereafter and on the day of, 19.., duly issued to L.... M...., sheriff of county, and that said sheriff by virtue of said execution thereafter duly levied upon the following described real estate [*describe same*] [*here state fully the proceedings upon execution, the sale of the premises, and execution and delivery of the sheriff's deed to the petitioner*];

That on the said day of, 19.., the said N.... O.... [*party in possession*] was, and now is, in possession of said premises;

That on said day of, 19.., your petitioner went upon said premises and exhibited his said sheriff's deed of said premises to said N.... O.... and then and there duly demanded of said N.... O.... the possession of said premises; but that he,

the said N.... O.... refused, and still refuses, to surrender the same, or any part thereof; and your petitioner prays for a writ of assistance to remove said N.... O.... from said premises, and to put your petitioner in possession thereof.

Dated, 19..

A.... B....,
Petitioner.

[*Venue.*]⁴

A.... B...., being first duly sworn, on oath says that the foregoing petition by him subscribed is true to his own knowledge except as to those matters therein alleged on information and belief, and as to those matters he believes it to be true.

A.... B....

[*Jurat.*]

[*To be served on the occupant as a summons is served.*]

2324. The same, after foreclosure sale.

[*Commence as in last preceding form and continue*]:

That this action was brought for the foreclosure of a mortgage, upon a tract of land known and described as follows [*insert description*];

That said judgment of foreclosure and sale was rendered in said action on the day of, 19.., and by the same it is adjudged, among other things, that said land be sold by the sheriff of the county of [*or, by R.... F...., Esq., referee*], and that the purchaser, at the sale, be let into possession, and that any of the parties [*etc., pursuing the terms of the judgment as to delivery of possession*].

That on the day of, 19.., after due notice, said premises were duly sold by said sheriff [*or, referee*], and were purchased by your petitioner, who duly paid the amount bid therefor, and on the day of, 19.., received from said sheriff [*or, referee*] a deed thereof, as more fully appears from the certificate [*or, report*] of sale, and order confirming the same, and also said deed, certified copies of which respectively are hereto annexed.

That on and before the day of delivery of said deed, the defendant, C.... D...., was in possession of said premises [and so continued until the day of, 19.., and ever since], on which last-mentioned day this deponent went upon said premises, and, after exhibiting to said C.... D.... the annexed certified copies of said certificate [*or, report*] and order of confirmation, and said deed, duly and personally demanded of said C.... D.... the possession of said premises, but that he refused and ever since refuses to surrender possession of the same or any

part thereof; and your petitioner prays, etc. [*conclude as in last preceding form and attach verification*].

2325. Notice of motion on foregoing petition (Wis. Stats. 1898, sec. 3025).

[*Title.*]

In the matter of the petition of
A.... B.... for a writ of assistance. }

To N.... O...., Esq. [*party in possession*].

TAKE NOTICE that the petition of which a copy is herewith served on you, will be presented to the Hon. R.... S...., circuit judge, at his chambers in the city of in said county, on the day of, 19.., at o'clock A. M. of that day [*or, to the circuit court of county*] at the court house in, on the day of, 19.., at the opening of court on said day, or as soon thereafter as counsel can be heard, and the undersigned will then and there move upon said petition [*if other affidavits are used*, and upon the affidavits of J.... K.... and L.... M...., hereto annexed] for a writ of assistance, as prayed in said petition.

[*Date.*]

E.... F....

Attorney for said A.... B....

2326. Order granting writ of assistance (Wis. Stats. 1898 sec. 3025).

[*Title as in preceding form.*]

[*Caption as in Form 7.*]

The motion for a writ of assistance herein coming on to be heard, at said term, on the petition of A.... B...., and [*if affidavits are used*, upon the affidavits of J.... K.... and L.... M....], and after hearing E.... F...., attorney for the petitioner, and G.... H...., attorney for N.... O...., in opposition thereto, and being advised in the premises,

IT IS ORDERED, that the writ of assistance issue as prayed in said petition.

By the Court:

R.... S...., Judge.

2327. Writ of assistance for land sold on execution (Wis. Stats. 1898 sec. 3025).

The State of Wisconsin, to the Sheriff of County,

GREETING: Whereas, on the day of, 19.., by judgment duly rendered in the circuit court for county, in an action then pending therein, wherein A.... B.... was plaintiff and C.... D.... was defendant, the said plaintiff

duly recovered judgment against said defendant, for the sum of dollars, damages and costs, which judgment was duly docketed in the county of, on the day of, 19..; and,

Whereas, by virtue of an execution thereafter duly issued out of said court, on the day of, 19.., the premises hereinafter described were duly levied upon, and sold, at sheriff's sale on execution, pursuant to law, and purchased at such sale by said A.... B.... and certificate of such sale duly made and given to him, and,

Whereas, the said premises not being redeemed from said sale, and more than fifteen months having elapsed thereafter the sheriff of county on the day of, 19.., duly executed and delivered to the said purchaser a deed of said premises so sold, pursuant to law.

And whereas, the said A.... B.... has demanded possession of said premises and N.... O.... is in possession thereof, claiming and holding under [*name the defendant under whom he claims*], [*or, and, one of said defendants, is in possession thereof*], and has refused and still refuses to give up possession of said premises, although the said sheriff's deed has been duly produced and exhibited unto him.

THEREFORE, we command you that you forthwith enter upon the following described premises, which are the premises to the possession of which said A.... B.... is entitled by virtue of the judgment and proceedings aforesaid, to-wit [*here describe premises*], and that you eject and remove therefrom the said N.... O...., and that you put the said A.... B...., or his assigns, in the full, quiet and peaceable possession of said premises, without delay, and him, the said A.... B...., in such possession thereof, from time to time, maintain, keep and defend, according to the tenor and intent of said judgment.

Witness, the Hon. R.... S....,
judge of our said circuit court for
..... county, at the court house,
in the city of, this day
of, 19..

[SEAL OF COURT.]

C.... K....,
Clerk.

2328. Writ of assistance for land sold on mortgage foreclosure.

The State of to the Sheriff of the County of,

GREETING: Whereas, on the day of, 19.., by a judgment of foreclosure and sale rendered in our court

of in an action then depending in said court, wherein A.... B.... is plaintiff, and C.... D.... and Y.... Z.... are defendants, it was, among other things, adjudged that all and singular the [mortgaged] premises mentioned in the plaintiff's complaint in said action [or so much thereof as might be sufficient to raise the amount due to the said plaintiff for the principal, interest, and costs in said action, and which might be sold separately without material injury to the parties interested], be sold by public auction, by or under the direction of R.... F...., Esq., a referee duly appointed for that purpose [*or, by the sheriff of said county*]. And also, that the purchaser [*here insert terms of the judgment as to giving possession.*]

And whereas, the said referee [*or, sheriff*] has duly filed his report of said sale, and the same has been duly confirmed by an order of said court, from which report it appears that the premises hereinafter described were sold to A.... B...., and that the referee's [*or, sheriff's*] deed has been executed and acknowledged and delivered to the said A.... B...., purchaser as aforesaid, and the said A.... B.... has not been let into, nor taken possession of the said premises, or any part thereof, according to the tenor of the judgment of the said court, notwithstanding the said A.... B.... has served on the said Y.... Z.... a certified copy of said order confirming the report of sale, and has also produced and shown to the said C.... D.... the said deed of the premises in pursuance of said judgment.

THEREFORE, we command you, that you forthwith enter upon said premises, which are described as follows, to-wit [*describe premises*] and that you eject and remove therefrom the said C.... D.... and any of the parties defendant in this action who may be in possession of said premises, or any part thereof, and any person who, since the commencement of this action, has come into the possession of said premises, or any part thereof, under him or them, and detains the same, or any part thereof, against the said A.... B...., and that you put the said A.... B...., or his assigns, in the full, peaceable, and quiet possession of the said premises without delay; and him, the said A.... B...., in such possession thereof, from time to time maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of said judgment.

[*Conclusion as in last preceding form.*]

CHAPTER CLV.

SUPPLEMENTARY PROCEEDINGS.

- | | |
|---|---|
| <p>2329. Affidavit for general discovery after execution returned unsatisfied.</p> <p>2330. Order to appear and answer, based on the foregoing.</p> <p>2331. Affidavit for discovery as to specific property, in aid of execution.</p> <p>2332. Order requiring discovery as to specific property, based on last preceding affidavit.</p> <p>2333. Affidavit for warrant of arrest of judgment debtor.</p> <p>2334. Warrant of arrest on last preceding affidavit.</p> <p>2335. Subpoena for other witnesses.</p> <p>2336. Examination of debtor and witnesses.</p> <p>2337. Another form, examination before referee.</p> <p>2338. Order that judgment debtor deliver specific property.</p> | <p>2339. Order appointing receiver.</p> <p>2340. Bond of receiver (Wisconsin and Minnesota).</p> <p>2341. Notice of receiver's appointment.</p> <p>2342. Order that debtor give undertaking.</p> <p>2343. Undertaking required by last preceding order.</p> <p>2344. Affidavit of non-attendance, as a foundation for contempt proceedings.</p> <p>2345. Affidavit of failure to deliver money or property, as a foundation for contempt proceedings.</p> <p>2346. Attachment for contempt against judgment debtor failing to appear as ordered.</p> <p>2347. Order adjudging debtor guilty of civil contempt.</p> <p>2348. Commitment thereon.</p> |
|---|---|

Though somewhat different in form, the various statutes, governing supplementary proceedings, or proceedings auxiliary to or in aid of execution, are substantially alike in their fundamental features. Most of the forms in this chapter are specially designed for use in Wisconsin, but it is thought that they may with slight alterations be used in any of the states covered by this work. Supplementary proceedings are proceedings in the nature of equitable executions and are proceedings in the original action in which the judgment is obtained and should be so entitled.

- 2329. Affidavit for general discovery after execution returned unsatisfied** (Wis. Stats. 1898 sec. 3030; Minn. Rev. Laws 1905 sec. 4320; Iowa Code sec. 4072; N. Dak. Rev. Codes sec. 5562 subd. 1; S. Dak. Rev. Code C. P. sec. 398 subd. 1; Cobby's Ann. Stats. Nebr. sec. 1538).

[Title.]

[Venue.]

A. . . . B. . . . , being duly sworn, deposes and says that he is the plaintiff [or, the attorney for the plaintiff] in this action; that

judgment was duly recovered herein by said plaintiff and against said defendant, C.... D...., on the day of, 19.., for dollars, damages and costs, in the court of county, and that said judgment was on the day of, 19.., at o'clock ..M., duly docketed in the office of the clerk of the court for the county of, state of; that execution upon said judgment against the property of said judgment debtor was on the day of, 19.., duly issued and delivered to the sheriff of county aforesaid; that said judgment debtor at the time of the issuing of said execution resided and still resides in said county; * and that the said sheriff has returned the said execution wholly unsatisfied [*or, unsatisfied as to the sum of dollars*]. And this deponent further says there is due and unpaid upon said judgment the sum of dollars, and [*if it is desired to obtain a restraining order meanwhile, set forth the facts justifying the same, e. g.*] that said judgment debtor is about to convey away and dispose of his property with intent to avoid the payment of said judgment.

And deponent asks that an order be made requiring said judgment debtor to appear before the Hon. J.... K...., Esq., at some time and place in said order to be named, and answer concerning his property and that said judgment debtor be forbidden from making any transfer of his property not exempt from execution, or from interfering therewith until further order.

A.... B....

[*Jurat.*]

2330. Order to appear and answer, based on foregoing affidavit.

[*Title.*]

It appearing to me by the affidavit of A.... B...., the plaintiff, in this action, that an execution upon the judgment in the above entitled action against the property of C.... D...., the judgment debtor therein, has been duly issued to the sheriff of county, and returned wholly [*or, in part*] unsatisfied;

I do hereby require you, the above named C.... D...., defendant aforesaid, to appear before me at my office [*specify place with exactness*] on the day of, 19.., at o'clock in the noon, to answer on oath concerning your property; and to abide and perform such further or other order as may be made by me in the premises, and in the meantime, and until the further order to the contrary, you, the said C.... D...., are hereby enjoined and restrained from making any

transfer or other disposition of your property not exempt by law from execution, and from any interference therewith.

Dated the day of, 19..

J.... K....,
[Official title.]

[Affidavit of service of above order.]

[Venue.]

N.... O...., being duly sworn, says that he did, on the day of, 19.., at, serve the above original order, and the affidavit thereunto annexed, on C.... D...., known by deponent to be the identical C.... D.... in said order named, by delivering to and leaving with him personally a true copy of the said order and the affidavit thereunto annexed, and at the same time showing to him the said original order, and the signature of the [name officer] who signed the same.

N.... O....

[Jurat.]

2331. Affidavit for discovery as to specific property, in aid of execution (Wis. Stats. 1898 sec. 3031; Iowa Code sec. 4073; N. Dak. Rev. Code sec. 5562 subd. 2; S. Dak. Rev. Code C. P. sec. 398 subd. 2; Cobbey's Ann. Stats. Nebr. sec. 1539).

[Title.]

[Proceed as in Form 2329 to the * and continue]: and that said execution has not been returned. And deponent further says that there is still due and unpaid on said judgment the sum of dollars and that said judgment debtor has property to-wit [particularly describe the property as far as possible], which is not by law exempt from execution, and which property said judgment debtor unjustly refuses to apply towards the satisfaction of said judgment; that on or about the day of, 19.., at county of and State of Wisconsin, this deponent requested said defendant to apply the said property hereinbefore described toward the satisfaction of said judgment, and that said defendant then and there refused to so apply said property or any part thereof; that deponent has good reason to believe, and verily does believe, that unless restrained by order, the said judgment debtor will transfer, dispose of, encumber or conceal his said property, and that deponent's reasons for such belief are the following [state any facts showing the probability of transfer or concealment].

And deponent asks that an order be made requiring said judgment debtor to appear before the Hon. J.... K.... at some time and place in said order to be named, and answer concerning his said property and restraining the said judgment debtor

from transferring, disposing of, concealing, encumbering or interfering with any of his said property not exempt by law from seizure or sale upon execution, until further order.

A.... B....

[*Jurat.*]

2332. Order requiring discovery as to specific property, based on last preceding affidavit.

[*Title.*]

It appearing to me by the affidavit of A.... B...., the plaintiff in this action, that execution upon the judgment in this action against the property of said judgment debtor was on the day of, 19.., duly issued and delivered to the sheriff of county aforesaid, and that said execution has not yet been returned by the said sheriff; and that there is due and unpaid on said judgment the sum of dollars; and that said judgment debtor resided in said county of at the time of the issuing of said execution, and still resides in said county and that said judgment debtor has property not exempt from execution to-wit [*describe property*], and which property he unjustly refuses to apply towards the satisfaction of said judgment:

I do hereby require you the above named C.... D.... defendant aforesaid to appear before me at my office [*describe location with exactness*] on the day of, 19.., at o'clock in the ...noon, to answer on oath concerning your property aforesaid; and to abide and perform such further or other order as may be made by me in the premises, and in the meantime, and until the further order to the contrary, you, the said C.... D...., are hereby enjoined and restrained from making any transfer or other disposition of your said property not exempt by law from execution, and from any interference therewith.

Dated the day of, 19..

J.... K....

[*Official title.*]

[*Add corroborating affidavit as to defendant's possession of property if obtainable.*]

2333. Affidavit for warrant of arrest of judgment debtor
(Wis. Stats. 1898 sec. 3032; Minn. Rev. Laws 1905 sec. 4321; N. Dak. Rev. Codes sec. 5562 subd. 4; S. Dak. Rev. Code C. P. sec. 398 subd. 4; Cobbey's Ann. Stats. Nebr. sec. 1540).

[*Title.*]

[*Proceed as in Forms 2329 or 2331 as the case may be up to and including the statement of the amount still due and unpaid*]

on the judgment and continue]: and that there is reason to believe that said judgment debtor has property, to-wit [*describe same*] which is not by law exempt from execution, and which property said judgment debtor unjustly refuses to apply towards the satisfaction of the said judgment; that on or about the day of, 19.., at county of and state of this deponent requested said defendant to apply the said property hereinbefore described toward the satisfaction of said judgment, and that said defendant then and there refused to so apply said property or any part thereof; that deponent verily believes that there is danger of said judgment debtor leaving the state of [*or, concealing himself*] and deponent's belief is founded upon the following facts [*state facts known to the deponent on which his belief is founded*] and deponent asks that a warrant to arrest said judgment debtor forthwith be issued to the sheriff of county, commanding said sheriff to arrest the said judgment debtor C.... D.... and bring him forthwith before the Hon. J.... K...., at some time and place in said order to be named, to answer concerning his property.

A.... B....

[*Jurat.*]

2334. Warrant of arrest on last preceding affidavit.

[*Title.*]

The State of Wisconsin, to the Sheriff of County,

GREETING: Whereas, a judgment was duly rendered in the above entitled action, in favor of A.... B...., and against C.... D...., on the day of, 19.., in said court, and duly docketed in county, on the day of, 19.., and whereas [*recite facts as to the issuance and return or non-return of the execution and amount due on the judgment*].

And whereas, proof has been furnished to the undersigned showing to his satisfaction by the affidavit[s] of A.... B.... and N.... O....; that there is danger of the said C.... D.... leaving the state [*or, concealing himself*].

And whereas, proof has also been furnished to the satisfaction of the undersigned that said C.... D...., judgment debtor, has property, to-wit [*describe same*], which he unjustly refuses to apply to such judgment.

Now, therefore, we do warrant and command you, that you arrest the said C.... D.... and bring him before the undersigned, a [*give title of officer*], at his office in, in said county, to answer concerning his property.

Given under my hand at, in the county of,
this day of, 19..

E.... F....,

Attorney for Plaintiff.

J.... K....,

[*Official title.*]

2335. Subpoena for other witnesses (Wis. Stats. 1898 sec. 3033; Minn. Rev. Laws sec. 4322; Iowa Code sec. 4076; N. Dak. Rev. Codes sec. 5565; S. Dak. Rev. Code C. P. sec. 401; Cobb. Ann. Stats. Nebr. sec. 1544).

The State of, to [*name witnesses*]:

You, and each of you are hereby required to be and appear before J.... K.... [*give title of office*], at his office in [*designate place*], on the day of, 19.., at o'clock in the noon of said day, to give evidence in a certain examination there pending, concerning the property of C.... D...., a judgment debtor of A.... B....

Given under my hand at, in said county, this day of, 19..

J. K.... [*Title of office.*]

[*or* L.... M...., Clerk Court.]

2336. Examination of debtor and witnesses.

[*Title.*]

Examination of the defendant C.... D...., in proceedings supplementary to [*or in aid of*] execution herein taken before J.... K.... [*title of officer*] on the day of, 19..

The said C.... D...., appearing pursuant to the order [*or warrant of arrest*] herein, being first duly sworn, testified as follows [*give testimony*].

C.... D....

[*Jurat.*]

N.... O...., a witness produced and examined on the part of the said judgment creditor, being duly sworn, testified as follows [*give testimony*].

N.... O....

[*Jurat.*]

2337. Another form, examination before referee.

[*Title.*]

Examination of the defendant C.... D.... in proceedings supplementary to execution in this action, taken before R.... F...., Esq., the referee appointed by [*name officer*] to take the same, on the day of, 19..

The said referee having administered the oath to the said [de-

fendant] Y.... Z...., he did thereupon depose and say as follows [*here follows the deposition*].

C.... D....

I hereby certify that the above [with Schedule A annexed] is the testimony and the whole of the testimony, of the defendant C.... D...., given on the examination pursuant to the annexed order in supplementary proceedings, this day of, 19..

R.... F...., Referee.

2338. Order that judgment debtor deliver specific property (Wis. Stats. 1898 sec. 3035; Minn. Rev. Laws 1905 sec. 4323; Iowa Code sec. 4077; N. Dak. Rev. Codes sec. 5567; S. Dak. Rev. Code C. P. sec. 403; Cobb. Ann. Stats. Nebr. sec. 1546).

[*Title.*]

It appearing to me from the foregoing examination of C.... D...., the judgment debtor herein, and of N.... O...., a witness, that the said judgment debtor has the following described property in his possession not exempt from execution, to-wit [*describe property*].

Now, on motion of E.... F...., plaintiff's attorney;

IT IS ORDERED that the said C.... D.... forthwith [*or within a stated time to be named*] deliver over to L.... M.... the sheriff of county, the above described property to be applied on the judgment in this action.

[*Date.*]

J.... K....,
[*Official title.*]

[*This oraer is to be made only when the execution is still in the hands of the sheriff. If the execution has been returned a receiver should be appointed and the debtor ordered to deliver the property to the receiver.*]

2339. Order appointing receiver.

[*Title.*]

Whereas on the day of, 19.., the above named plaintiff presented to me an affidavit stating that [*here recite facts stated in the affidavit*].

And whereas pursuant to an order [*or warrant of arrest*] made by the undersigned the said C.... D.... has been examined before me and answered concerning his property, which examination [together with the examination of N.... O...., a witness] has been reduced to writing, and it appearing therefrom that said C.... D.... has property not exempt from execution which should be applied to the payment of said judgment, and that one Q.... R.... is alleged to have possession of

such property and claims title thereto or an interest therein adverse to said C.... D.... [*or is alleged to be indebted to said C.... D....*]. And whereas it further appears by the oath of said A.... B.... that no other supplementary proceedings are pending against said C.... D....

On motion of, [plaintiff's] attorney,

IT IS ORDERED: that R.... C...., of, be, and he is hereby appointed receiver of the debts, property, equitable interests, rights and things in action, of the said judgment debtor, with the usual powers of receivers in such cases, upon his filing a bond with and executed to the clerk of this court, in the penal sum of dollars, with sufficient surety, who shall justify as in case of arrest and bail, and be approved by me, conditioned for the faithful discharge of his duties, in the usual form.

[*Date.*]

J.... K....

[*Title of officer.*]

2340. Bond of receiver (Wisconsin and Minnesota).

[*Proceed as in form 461 to the word "Whereas" and continue*]:

Whereas by an order made by J.... K.... [*give official title*] on the day of, 19..., in certain proceedings supplementary to execution in the action of A.... B...., plaintiff, against C.... D...., defendant, in said court, it was ordered that the above bounden R.... C.... be appointed receiver of the debts, property, equitable interests, rights and things in action of the said C.... D.... with the usual powers of receivers in such cases, upon his filing a bond with and executed to the clerk of said court in the penal sum of dollars, with sufficient surety, conditioned for the faithful performance of his duties as such receiver.

NOW THE CONDITION of this obligation is such that if the said R.... C.... shall duly account for all property and effects which shall come into his hands or under his control as such receiver and apply the same as he may be directed by said court, and obey all orders of said court in relation to his said trust, and in all things faithfully perform his duties as such receiver, then this obligation to be void; otherwise of force.

R.... C.... [Seal.]

Signed, sealed, and delivered in G.... H.... [Seal.]

presence of [*two witnesses.*] J.... K.... [Seal.]

[*Add justification of sureties as in case of arrest and bail, Form 191, and in Minnesota add acknowledgment.*]

2341. Notice of receiver's appointment.

[Title.]

TAKE NOTICE that on the day of, 19.., the undersigned was appointed receiver of the debts, property, equitable interests, rights and things in action of the said C.... D.... by an order made by J.... K...., Esq. [*give official title*] in certain proceedings supplementary to execution in said action there pending, and that I have filed a bond as such receiver as required by said order which has been duly approved, and have in all respects duly qualified as such receiver, and that I hereby demand payment to me as such receiver of all debts owing to said C.... D.... and the delivery to me of all property, equitable interests, rights and things in action which belonged to the said C.... D.... or in which he had any interest on the said [*date of appointment*] or at any time thereafter, and an accounting for the proceeds thereof.

[Date.]

R.... C...., Receiver.

To C.... D.... and to Q.... R....

[*name any persons alleged to be indebted or to have property*].

2342. Order that debtor give undertaking (Wis. Stats. 1898 sec. 3034; Minn. Rev. Laws 1905 sec. 4321; N. Dak. Rev. Codes sec. 5562 subd. 4; S. Dak. Rev. Code C. P. sec. 398 subd. 4; Cobb. Ann. Stats. Nebr. sec. 1540).

[Title.]

It appearing satisfactorily to me, upon [*or, pending*] the examination herein, by the answer of said judgment debtor [*or by the testimony of N.... O...., and the affidavit of O.... P....*], that there is danger that said C.... D.... will leave the state, and that he has property which he has unjustly refused to apply to the judgment herein;

On motion of E.... F...., attorney for the plaintiff,

IT IS ORDERED: That the said C.... D...., judgment debtor, do enter into an undertaking [*in Minnesota, a bond*], within three days, with two sureties, in the sum of dollars, that he will from time to time attend before me [*the judge, or, court commissioner*], as I shall direct, and that he will not during the pendency of the proceedings herein, dispose of any portion of his property not exempt from execution.

[Date.]

J.... K....

[Official title.]

2343. Undertaking required by last preceding order.

[Title.]

Whereas C.... D.... has been ordered by the court [*or name*

the official], to give an undertaking in supplementary proceedings in this action, to the effect hereinafter stated.

Now, therefore, we, the said C.... D...., as principal, and X.... Y...., of, and Y.... Z...., of, as sureties, do hereby jointly and severally undertake, in the sum of dollars, that the said C.... D...., will from time to time attend before the said [*name officer*] as he shall direct, and that he will not, during the pendency of the proceedings, dispose of any portion of his property not exempt from execution.

[*Date.*]

C.... D....

X.... Y....

Y.... Z....

[*Venue.*]

X.... Y.... and Y.... Z...., being each first duly sworn, each for himself says, that he has signed the foregoing undertaking, that his residence and occupation are therein truly stated; that he is a resident and householder [*or, and freeholder*] within this state, and that he is worth the sum of one thousand dollars in property within this state, exclusive of property exempt from execution.

[*Jurat.*]

X.... Y....

Y.... Z....

[*In Minnesota the security should be in form of a bond and should be acknowledged as in the general form of a bond. See Form 2286.*]

2344. Affidavit of non-attendance, as a foundation for contempt proceedings.

[*Title.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff herein; that he did, on the day of, 19.., at o'clock in the noon, attend before the Hon. J.... K.... [*give official title*] [*or, before R.... F...., Esq., the referee named in the annexed order*], at [*name place where examination was ordered to be held*] and there remained for one hour, prepared to take the examination of C.... D...., pursuant to the annexed order; that during that time, the said C.... D.... failed to appear before the said judge [*or, referee*], at the place aforesaid, nor did any one appear for him, nor was any cause shown for his failing to appear, and thus disobeyed the annexed order; and deponent further says that at said time and place he caused the default of the said C.... D.... to be duly noted by the proper officer [*or, said referee*].

E.... F....

[*Jurat.*]

2345. Affidavit of failure to deliver money or property, as a foundation for contempt proceedings.

[Title.]

[Venue.]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that in the course of certain supplementary proceedings in this action an order was duly made by [name officer] requiring the said C.... D.... [state requirements of order] which order was duly served upon said C.... D.... on the day of, 19.., as appears by the affidavit of service indorsed thereon and herewith submitted, which order is annexed to this affidavit and made part hereof. That said C.... D.... has wholly refused and still refuses to obey said order and refuses to deliver over said property [or otherwise specifically state the default] although due demand has been made on him so to do, and declares that he will not comply with said order.

E.... F....

[Jurat.]

2346. Attachment for contempt against judgment debtor failing to appear as ordered.

The State of to the Sheriff of County.

GREETING: Whereas it has been made to appear that A.... B...., plaintiff, duly recovered judgment against C.... D...., defendant, in the court of county on the day of, 19.., in an action then pending therein for dollars damages and costs; that said judgment was duly docketed in said county on the day of, 19..; that execution was duly issued out of said court to the sheriff of county on said judgment on the day of, 19.., which execution has been returned unsatisfied, and that said C.... D.... at all of the times above named resided and still resides in said county of

And whereas it further appears that on the day of, 19.., an affidavit was duly made and sworn to by E.... F...., the attorney for the plaintiff in said action, stating the fact of the rendition of said judgment, the due issue and return of said execution, and that there was due and unpaid on said judgment the whole amount thereof, to-wit, the sum of dollars and interest [or a part thereof, stating what part].

And whereas, upon said affidavit an order was duly issued by the undersigned on the day of, 19.., requiring the said C.... D.... to appear before the undersigned on

the day of, 19.., at o'clock in the forenoon, at [*state place as in order*], within said county of, and answer concerning his property.

And whereas, said order was duly served on the said C.... D.... on the day of, 19.., at, by delivering to and leaving with him personally, a true copy thereof, and of the affidavit upon which the same was founded, and at the same time showing him the said original order with my signature thereto signed; all of which appears to my satisfaction, by the affidavit of E.... F...., now on file in this proceeding.

And whereas, the said C.... D.... did not appear before me at the said time and place designated in said order, although the said plaintiff attended there by his attorney, E.... F...., and after waiting then and there for *one* hour after the hour designated in said order, for the appearance of said C.... D...., and he not appearing and being then and there called, before me, and failing to appear, in disobedience of said order; and the attorney of the plaintiff having moved that an attachment be issued against him, the said C.... D...., judgment debtor, to answer touching the contempt aforesaid, in failing to appear before me, as required by said order so made by me, bearing date the day of, 19.. ;

NOW, THEREFORE, you are hereby required and commanded to attach the said judgment debtor so that you have his body before me, at the [*state place*], in said county, forthwith, then and there to answer touching the contempt aforesaid, and further to perform and abide such order as shall then be made in this behalf; and have you then and there this writ.

Given under my hand at, in said county, this day of, 19..

J.... K....
[*Official title.*]

2347. Order adjudging debtor guilty of civil contempt.

[*Title.*]

An attachment having been issued by me in this action, and proceeding on the day of, 19.., against C.... D.... for an alleged contempt in disobeying an order made herein on the day of, 19.., and duly served on him, on the day of, 19.., requiring him, the said C.... D.... to [*state act required*], and the sheriff, pursuant to said writ, having brought the said C.... D.... before me to answer touching said contempt; and the said C.... D.... having been given full opportunity to purge himself of said alleged contempt [and having been examined before me], E....

F...., Esq., appearing for the judgment creditor in said action and G.... H...., Esq., for said C.... D....,

IT IS HEREBY ORDERED and adjudged that said C.... D.... has been guilty of a wilful contempt in disobeying the order made by me in this action on the day of, 19.., by [*state manner of disobedience*] and that said disobedience was calculated to and did defeat, impair and prejudice the rights of the said A.... B...., plaintiff herein, to his loss and injury.

And it is further ordered and adjudged that as punishment for said contempt the said C.... D.... be committed to the common jail of said county, there to be imprisoned until he shall have obeyed said order by [*state act to be performed*] and that a commitment issue for the execution of this order.

[*Date.*]

J.... K....,
[*Official title.*]

2348. Commitment thereon.¹

The State of to the Sheriff of the County of

GREETING: Whereas [*here recite recovery of original judgment, issue and return of execution, issuance of the order in supplementary proceedings, and the proceedings thereon, the order made and the fact of the defendant's disobedience, the issue of the writ of attachment, the hearing thereon and the judgment*].

NOW, THEREFORE, you the said sheriff, are hereby commanded that you commit the said C.... D.... to the common jail of said county of, and there imprison him, until he shall have obeyed said order dated, 19.. [*here specify act to be done*], or until he shall be discharged pursuant to law.

Given under my hand this day of, 19..

J.... K....,
[*Official title.*]

¹The statutes of all the states provide for the enforcement of orders made in course of supplementary proceedings by proceedings for contempt in case of disobedience. In the chapter on contempts in this work (Chapter

CXLI) will be found a headnote on the general subject which may be useful, and also a collection of forms which renders it unnecessary to insert any further forms here.

CHAPTER CLVI.

SALES ON EXECUTION.

- | | |
|--|--|
| 2349. Notice of sale on execution, general form. | erty (North Dakota and South Dakota). |
| 2350. Sheriff's certificate of sale of real estate on execution (Wisconsin). | 2354. Sheriff's return on execution sale of personal property (North Dakota and South Dakota). |
| 2351. Sheriff's certificate of redemption from execution sale (Wisconsin). | 2355. Sheriff's return on execution sale of real property (North Dakota and South Dakota). |
| 2352. Sheriff's deed on execution sale (Wisconsin). | 2356. Sheriff's deed on execution sale (North Dakota and South Dakota). |
| 2353. Sheriff's certificate on execution sale of real prop- | |

The statutes of the various states covered by this work (except Nebraska), provide in substantially similar terms for the execution and delivery to the purchaser of a certificate of sale by the sheriff, immediately after the completion of the sale. Two forms are given in this chapter for such certificate: one specially applicable in Wisconsin, Form 2350; and one specially applicable in North Dakota and South Dakota, Form 2353; either of which, with slight changes, can be adapted for use in Minnesota and Iowa.

The same is true as to the sheriff's deed upon execution sale, for which two forms are given: one specially adapted to Wisconsin, Form 2352; and one specially adapted to North Dakota and South Dakota, Form 2356. Either of the last named forms may be easily adapted for use in the states of Minnesota, Iowa and Nebraska.

2349. Notice of sale on execution, general form.

SHERIFF'S SALE.

By virtue of an execution, issued out of and under the seal of the court in and for the county of and state of, upon a judgment rendered and docketed in the said court, on the day of, 19.., in an action wherein A.... B.... is plaintiff, and C.... D.... is defendant, in favor of the said plaintiff, and against the said defendant, for the sum of dollars, which execution was directed and de-

livered to me as sheriff in and for said county of, I have levied upon all the right, title and interest of the said defendant C. . . . D. . . . in and to the following described real property, to-wit [*describe property*], [*if the property to be sold be personal property describe same so that it may be identified*];

NOTICE is hereby given, that I, the undersigned, as sheriff as aforesaid, will sell the above described real [*or, personal*] property to the highest bidder, for cash, at public auction, at the [*name place*] in the city of in the county of and state of, on, the day of, 19. . ., at o'clock . . M., of that day, to satisfy the said execution, together with the interest and costs thereon.

Dated, 19. .

L. . . . M. . . . ,
Sheriff of County.

2350. Sheriff's certificate of sale of real estate on execution
(Wis. Stats. 1898 sec. 3000).

[*Title.*]

[*Venue.*]

I, L. . . . M. . . . , sheriff of county, Wisconsin, do hereby certify, that whereas, by an execution in the above entitled action to me directed and delivered, bearing date the day of, 19. ., I was commanded to satisfy the said execution and the judgment in said action, out of the real property of said C. . . . D. . . . in default of personal property out of which to satisfy the same;

And whereas, I could not satisfy the same out of the personal property of said C. . . . D. . . . , I, the said sheriff, on the day of, 19. ., at o'clock in the noon, at [*name place*] in the city of in the county of, and state of Wisconsin, having first given public notice by advertisement, as the law directs, of the time and place of said sale, did offer for sale and sell at public auction the premises described as follows, to-wit [*describe premises*], unto M. . . . N. . . . for the sum of dollars, he being the highest bidder therefor; and said sum being the highest sum bidden for the same, and the whole consideration money paid.

And I do further certify, that such sale will become absolute, and such purchaser will be entitled to a conveyance pursuant to law, of the said premises so sold, at the expiration of fifteen months from the date hereof, to-wit, on the day of, 19. ., unless said premises are previously thereto redeemed as provided by law.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this day of, 19..

L.... M.... [Seal.]

Signed, sealed and delivered in Sheriff, ... Co., Wis.
presence of [*two witnesses*].

2351. Sheriff's certificate of redemption from execution sale (Wis. Stats. 1898 sec. 3026).

KNOW ALL MEN by these presents, that I, L.... M...., sheriff of county, Wisconsin, do hereby certify that on the day of, 19.., C.... D.... of, in said county, duly exhibited to me the evidences required by law of his right to redeem the real property hereinafter described as judgment debtor in the action hereinafter named [*or, as creditor of the judgment debtor, etc.*] and did on said day duly redeem said real property from a sale of the same made on the day of, 19.., by the sheriff of said county, which sale was made under and by virtue of a certain execution duly issued and delivered to said sheriff on the day of, 19.., out of the court of county, Wisconsin, to enforce the final judgment in an action in said court wherein A.... B.... was plaintiff and C.... D.... was defendant, and that in making such redemption he duly paid to me on the day first named the sum of dollars in lawful money, that being the full sum required by law to redeem said real property from said sale. Said property so redeemed is described as follows, to-wit [*insert description*].

IN WITNESS WHEREOF, I have hereunto set my hand this day of, 19..

L.... M....,
Sheriff, ... Co., Wis.

[*Venue.*]

On this day of, 19.., before me, a notary public in and for said county and state, personally appeared L.... M...., known to me to be the sheriff of county, Wisconsin, and the person who is described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same as such officer for the uses and purposes therein set forth.

[SEAL.]

X.... Y....,
Notary Public.

2352. Sheriff's deed on execution sale (Wis. Stats. 1898 sec. 3017).

THIS INDENTURE, made this day of, 19.., between L.... M...., sheriff of county, state of Wisconsin,

sin, of the first part, and C.... D.... of in said county, of the second part;

WITNESSETH, that whereas, by virtue of a certain execution issued out of the court for the county of, to L.... M...., sheriff as aforesaid, directed and delivered, tested, 19.., and commanding him that of the goods and chattels of the said defendant, C.... D...., he should cause to be made certain moneys, in the said writ specified, and if sufficient goods and chattels could not be found, then that he should cause the amount so specified to be made of the real estate which the defendant had on the day in the said writ mentioned, to-wit: the day of, 19.., [*day on which the judgment was docketed*], or at any time afterwards, in whose hands soever the same might be, as by the said writ of execution more fully appears.

And whereas, after the delivery of said writ to said sheriff, and before the return day thereof, the then sheriff did, by virtue of the said writ, levy on, seize and take the lands hereinafter particularly described, and for want of goods and chattels in his said county of the said C.... D.... to satisfy the said damages and costs mentioned in said writ, sold the said lands as hereinafter mentioned at public auction, at the [*name place*] in said county on the day of, 19.., having first given public notice of the time and place of such sale, by causing a notice thereof to be published in a public newspaper published in said county, once a week for six weeks successively next preceding said day of sale, and by affixing up in three public places in the said town where the said premises are situated three notices of sale, said notices so published in said newspaper and posted up, as aforesaid, containing an intelligible description of the land, so to be sold, together with the time and place of such sale, to M.... N...., for the sum of dollars, he being the highest and best bidder therefor, and that being the highest sum bid for the same.

And whereas, upon the said sale, the then sheriff made out and subscribed duplicate certificates of sale, containing a particular description of the premises sold, the price bid for the same, the whole consideration money paid, and the time when such sale would become absolute and the purchaser would be entitled to a conveyance pursuant to law, and of which duplicate certificates were, within ten days after the sale of said land, filed in the office of the register of deeds in the said county of, as appears from said certificate now on file, and the other was delivered to said purchaser.

And whereas, the said premises, after the expiration of fifteen

months from the time of the said sale, remain unredeemed, and no creditor of the said C.... D.... has acquired the right or title of the said purchaser,

Now, therefore, know ye, that I, the said L.... M...., sheriff aforesaid, by virtue of the said writ of execution and of the statute in such case made and provided, and in consideration of the said sum of dollars, to my predecessor [*or, to me*] in hand paid by the said C.... D...., the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain and sell unto said M.... N.... and to his heirs and assigns forever, all the [*describe property*] in the county of, and state of Wisconsin, with the appurtenances, and all the estate, right, title and interest which the said C.... D.... had in the premises on the said day of, 19.., up to the day of sale thereof.

TO HAVE and to hold the said land and premises, and every part thereof, with the appurtenances, unto the said C.... D...., his heirs and assigns forever, as fully and absolutely as I, the said sheriff aforesaid, and under the authority aforesaid, might, could or ought to sell and convey the same.

In witness whereof, the said party of the first part, sheriff as aforesaid, hath hereunto set his hand and seal, the day and year first above written.

L.... M.... [Seal.]
Sheriff, ... Co., Wis.

Signed, sealed and delivered in
presence of [*two witnesses*].
[*Venue.*]

Be is remembered, that on the day of, 19.., appeared before me the above named L.... M...., sheriff of county, to me known as the individual and officer named in the foregoing deed, and mentioned as party of the first part, and acknowledged the execution of the same, as such sheriff, for the uses and purposes therein set forth.

X.... Y....,
Notary Public, ... Co., Wis.

2353. Sheriff's certificate on execution sale of real property
(N. Dak. Rev. Codes sec. 5538; S. Dak. Rev. Code C.
P. sec. 373).

[*Venue.*]

I, L.... M...., sheriff of county, state of, do hereby certify that, by virtue of an execution to me directed and delivered, issued out of the clerk's office, of the court, in and for said county of, duly attested and sealed,

upon a judgment rendered on the day of, 19.., in said court, in favor of A...B..., plaintiff, and against C...D..., defendant, I levied upon, and afterwards, to-wit, on the day of, 19.., at the hour of 'o'clock in the noon of said day, having first given public notice of the time and place of sale as required by law, I did offer for sale at public auction, at [name place] in the county of the following described real estate and premises situated in the county of and state of, to-wit [*describe premises*]. And I then and there openly and publicly struck off and sold the same to M.... N.... for the aggregate sum of dollars and cents [*if the sale was in separate parcels add, and that said sale was made in parcels for the respective prices following, name parcels and prices*].

And I further certify that said purchaser was the highest bidder for said premises and for each tract or parcel included therein, and that the price for which they were sold as aforesaid was the highest price bid for each distinct parcel, and the whole price so bid was paid in by said purchaser. And I further certify that the said purchaser will be entitled to a deed of said premises so sold at the expiration of one year from the date of said sale, unless the said premises are previously redeemed as provided by law.

Given under my hand this day of, 19..

L.... M....,
Sheriff, ... County.

[*Venue.*]

On this day of, 19.., before me, a notary public in and for said county and state, personally appeared L.... M...., sheriff of county, known to me to be the person and officer who is described in and who executed the within and foregoing instrument and acknowledged to me that he executed the same.

X.... Y....,
[SEAL.] Notary Public, ... County.

2354. Sheriff's return on execution sale of personal property
(N. Dak. Rev. Codes sec. 5509; S. Dak. Rev. Code C. P. sec. 337).

[*Title.*]

To the Court in and for the County of

I, L.... M...., sheriff of county, state of, do hereby certify and return that the within and annexed execution came into my hands on the day of, 19.., at o'clock in the noon of that day, and I thereupon in-

dorsed on said execution the day and hour I received the same, and I immediately proceeded to execute the same with due diligence. And thereafter, to-wit, on the day of, 19.., by virtue of the execution, I duly levied upon and took into my possession, the following described personal property, in the county of in the state of, to-wit [*describe property*], being the property of said defendant, and thereafter, to-wit, on the day of, 19.., I duly served upon said C.... D.... a notice of levy by delivering to and leaving with said C.... D.... personally, a true copy of the same at [*name place*]; and I thereupon proceeded to advertise said personal property, to be sold by me at in said county and state, on, the day of, 19.., at the hour of o'clock ..M., of said day. That before making such sale I caused public notice of the time and place thereof to be given by advertisement for at least ten days before the day of such sale, as required by law, as follows: By causing a notice thereof to be published ten days immediately preceding said sale, in N.... Z...., a weekly newspaper printed and published in said county, where the said personal property to be sold was situated, as more fully appears by the affidavit of O.... P...., the publisher of said paper, hereto annexed and made a part of this return.

And I further report and return, that on the said day of, 19.., at the hour of o'clock in the noon of that day, I exposed said personal property for sale at public auction at [*name place*], and that then and there said personal property was separately struck off and sold to the parties hereinafter named for the aggregate sum of dollars and cents, in the manner and price following, to-wit:

Name of Article.	Name of Purchaser.	Price Paid.
.....		
.....		
.....		

And I further certify and report, that said above named purchasers were respectively the highest bidders for said property and that the prices above stated were respectively the highest prices bid for each article; and the whole price bid was paid to me by said purchasers, and that said sale was in all respects honestly and fairly conducted according to law; and that attached hereto is a full and correct statement of said judgment, costs and disbursements, and the total amount received on said sale; and I return this execution fully satisfied.

[*Date.*]

L.... M....,
Sheriff of County, ...

STATEMENT OF JUDGMENT, COSTS AND DISBURSEMENTS.

Amount of Judgment
 Amount of Interest at 7 per cent. from....
 Sheriff's Fees
 Printer's Fees, Notice of Sale.....
 Clerk's Fees
 Total Judgment, Interest and Costs.....
 Total amount for which property was sold..

**2355. Sheriff's return on execution sale of real property
 (North Dakota and South Dakota).**

[*Title.*]

To the Court in and for the County of

I, L.... M...., sheriff of county, state of, do hereby certify and return that the within and annexed execution came into my hands on the day of, 19.., at o'clock in the noon of that day, and I thereupon indorsed on said execution the day and hour I received the same, and I immediately proceeded to execute the same with due diligence.

And after a diligent search and inquiry as required by law, I could find no personal property of the defendant C.... D.... whereby this execution could be satisfied in whole or in part, and I thereupon made an indorsement on said execution to that effect, to-wit: "no personal property found."

And thereafter, to-wit, on the day of, 19.., by virtue of said execution, I duly levied upon and seized the following described real property situated in the county of in the state of, to-wit [*describe property*], the property of the said defendant C.... D.... which is described in the notice of sale hereinafter mentioned. And I thereupon proceeded to advertise said real property, to be sold by me at the [*name place*] in said county and state, on, the day of, 19.., at the hour of o'clock .. M., of said day. That before making such sale I caused public notice of the time and place thereof to be given by advertisement for at least thirty days before the day of such sale, as required by law, as follows: By causing a notice thereof to be published once a week during the thirty days immediately preceding said sale, in the N.... Z...., a weekly newspaper printed and published in said county, where the said real property to be sold is situated, to-wit: Commencing on the day of, 19.., and terminating on the day of, 19.., as more fully appears by the affidavit of O.... P...., the publisher of said paper hereto annexed.

And I further report and return, that on the said day of, 19.., at the hour of o'clock in the noon of that day, I exposed said real property for sale at public auction at in said county, and that then and there said real property was separately struck off and sold to M.... N.... for the aggregate sum of dollars and cents, in the manner and price following, to-wit [*if sale was in parcels, name each parcel and amount received for each*].

And I further certify and report, that said M.... N.... was the highest bidder for said property, and for each of the above lots or parcels included therein, and that the prices above stated were the highest prices bid for each parcel; and the whole price bid was paid to me by said purchaser and that said sale was in all respects honestly and fairly conducted according to law.

And I further certify, that I thereupon gave to the purchaser a certificate of sale containing a particular description of the real property sold, the price paid and bid for each distinct parcel, and the whole price paid, and that the said purchaser would be entitled to a deed of said premises so sold at the expiration of one year from the day of said sale, unless said property should be previously redeemed, as provided by law. That I, as such sheriff, duly executed and acknowledged said certificate of sale as required by law.

Attached hereto is a statement of said judgment, interest and costs and the amount realized on said sale.

And I return this execution fully satisfied.

[Date.]

L.... M....,
Sheriff in and for the County
of, ...

STATEMENT OF JUDGMENT, COSTS AND DISBURSEMENTS.

Amount of Judgment.....	\$.....	\$.....
Amount of Interest at 7 per cent. from..		
Sheriff's Fees		
Printer's Fees, Notice of Sale.....		
Clerk's Fees		
.....		
Recording Certificate of Sale.....		
Total amount for which property was sold		

2356. Sheriff's deed on execution sale (N. Dak. Rev. Codes sec. 5550; S. Dak. Rev. Code C. P. sec. 384).

THIS INDENTURE, made this day of, 19.., between L.... M...., sheriff of county, ..., of the

first part, and M.... N...., of, in the county of, state of, of the second part;

WHEREAS, by virtue of a writ of execution issued out of and under the seal of the court of the judicial circuit of the state of, in and for the county of, tested the day of, 19.., upon a judgment recovered in said court on the day of, 19.., in favor of A.... B...., plaintiff, and against C.... D...., defendant, to the said sheriff directed and delivered, commanding him that of the personal property of the said judgment debtor, C.... D...., in his county, he should cause to be made certain moneys in the said writ specified, and if sufficient personal property of the said judgment debtor could not be found, that then he should cause the amount of said judgment to be made of the lands, tenements and real property belonging to said judgment debtor on the day of, 19.., or at any time afterward;

And whereas, said judgment was duly docketed in said county on the day of, 19..

And whereas, because sufficient personal property of the said judgment debtor, C.... D...., could not be found whereof he, the said sheriff, could cause to be made the money specified in said writ, he, the said sheriff, did, in obedience to said command, levy on, take and seize all the estate, right, title and interest which the said judgment debtor, C.... D...., so had of, in and to the lands, tenements, real estate and premises hereinafter particularly set forth and described, with the appurtenances and improvements thereunto belonging or in anywise appertaining, and did on the day of, 19.., sell the said premises at public auction at [*name place*] in the city of in said county of, state of, at the hour of o'clock .. M., after having first given notice of the time and place of such sale, by advertising the same according to law; at which sale the said premises were struck off and sold to the said M.... N...., party of the second part, for dollars, the said M.... N.... being the highest bidder and that being the highest sum bidden, and the whole price paid for the same;

And whereas, the said sheriff, after receiving from said purchaser the said sum so bidden as aforesaid, gave to the said purchaser at such sale a certificate of sale as is by law directed to be given;

And whereas, one year after such sale has expired without any redemption of said premises having been made; and whereas, said party of the second part is the owner and holder of said certificate;

NOW THIS INDENTURE witnesseth, that L.... M....,

sheriff aforesaid, and party hereto of the first part, by virtue of the said writ, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of dollars above mentioned, to him in hand paid as aforesaid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed and confirmed, and by these presents doth grant, bargain, sell, convey and confirm unto the said party of the second part, and to his heirs and assigns all the estate, right, title and interest which the said judgment debtor, the said C.... D...., had on the day of, 19.. [*date of docketing judgment*] or at any time afterward, or now has, of, in and to all the following described premises, situated, lying and being in the said county of and state of, to-wit [*describe premises*] together with all and singular the tenements, hereditaments, appurtenances and improvements thereunto belonging or in anywise appertaining.

TO HAVE and to hold the said premises, with the appurtenances, unto the said party of the second part, his heirs and assigns forever, as fully and as absolutely as he, the sheriff aforesaid, can, may or ought to, by virtue of the said writ and of the statute in such case made and provided, grant, bargain, sell, release, consign, convey and confirm the same.

IN WITNESS whereof, the said sheriff, the party of the first part to these presents, hath hereunto set his hand and seal the day and year first above written.

In presence of L.... M...., [Seal.]
[two witnesses.] Sheriff of the County of

....., ...

[*Venue.*]

On this day of, 19.., before me, a notary public in and for said county and state, personally appeared L.... M...., sheriff of county, known to me to be the person and officer who is described in and who executed the within and foregoing instrument, and acknowledged to me that he executed the same.

[SEAL.]

X.... Y....,
Notary Public,
..... County.

CHAPTER CLVII.

'APPEALS AND WRITS OF ERROR.

- | | |
|--|--|
| <p>2357. Notice of appeal to supreme court from whole judgment.</p> <p>2358. The same, from part of a judgment.</p> <p>2359. The same, from an order or part thereof.</p> <p>2360. Undertaking for costs and damages on appeal.</p> <p>2361. Undertaking to stay execution on money judgment.</p> <p>2362. Undertaking where judgment directs delivery of documents or personal property.</p> <p>2363. The same, where judgment directs sale or delivery of real property.</p> <p>2364. Undertaking on appeal from foreclosure judgment.</p> <p>2365. Undertaking on appeal from judgment abating a nuisance.</p> <p>2366. Undertaking in special case (Wisconsin).</p> <p>2367. Order fixing conditions and terms of undertaking on</p> | <p>appeal from an intermediate order.</p> <p>2368. Undertaking on appeal from order vacating writ of attachment or injunction.</p> <p>2369. Order continuing attachment or injunction on giving last preceding undertaking.</p> <p>2370. Writ of error in civil action (Wisconsin).</p> <p>2371. Bond for costs and damages on writ of error in civil action (Wisconsin).</p> <p>2372. Supersedeas bond on writ of error in civil action (Wisconsin).</p> <p>2373. Supersedeas bond on appeal (Iowa).</p> <p>2374. Order staying proceedings (Iowa).</p> <p>2375. Countermand of execution on filing supersedeas bond (Iowa).</p> <p>2376. Supersedeas bond on petition in error (Nebraska).</p> <p>2377. Supersedeas bond on appeal in equity (Nebraska).</p> |
|--|--|

2357. Notice of appeal to supreme court from whole judgment (Wis. Stats. 1898 sec. 3049; Minn. Rev. Laws 1905 sec. 4359; Iowa Code sec. 4114; N. Dak. Rev. Codes sec. 5606; S. Dak. Rev. Code C. P. sec. 441).

[Title of action in trial court naming all parties.]

To E.... F...., Esq., Attorney for Plaintiff, and L.... M....,
Clerk of the aforesaid court:

PLEASE TAKE NOTICE that the defendant above named [or the defendant, C.... D....] hereby appeals to the supreme court of the state of from * the judgment rendered by the above named court herein, entered on the day of, 19.., in favor of the plaintiff and against the defend-

ant [*if it be simply a money judgment insert, for the sum of*
 dollars damages and costs] and from the whole thereof.
 [Date.]

G.... H....,

Attorney for Defendant C.... D....

2358. The same from part of a judgment.

[*Proceed as in last preceding form to the * and continue*]: that part of the judgment rendered by the above named court herein entered on the day of, 19.., in favor of the said plaintiff and against the said defendant which adjudges that [*here specify exactly the part appealed from*].

[Date.]

G.... H....,

Attorney for Defendant C.... D....

2359. The same, from an order or part thereof.

[*Proceed as in Form 2357 to the * and continue*]: the whole of that certain order made and entered in this action by said court on the day of, 19.., a copy of which order is hereunto annexed. [*Or in case of an appeal from a part*] that part of the order made and entered in this action, by said court, on the day of, 19.., a copy of which order is hereto annexed, which orders that [*specify particularly part appealed from*].

[Date.]

G.... H....,

Attorney for Defendant C.... D....

[*The statute of Wisconsin allows two or more orders to be embraced in one appeal, in which case it will be simply necessary to add to the foregoing "and also from the whole, or that part, of an order, etc." Wis. Stats. 1898 sec. 3049.*]

2360. Undertaking for costs and damages on appeal (Wisconsin, Minnesota, North Dakota and South Dakota).

[*Title of action in trial court.*]

WHEREAS, on the day of, 19.., in the court within and for the county of, the above named plaintiff recovered a judgment against the above named defendant * for dollars damages and costs [*or otherwise briefly state the nature of the judgment*].

And the above named defendant, C.... D...., feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the state of

Now, therefore, we, N.... O.... and O.... P...., of the city of in said county, do hereby undertake that the said appellant will pay all costs and damages [*in Minnesota charges*].

which may be awarded against him on said appeal not exceeding two hundred and fifty dollars.

Dated 19..

N.... O....

O.... P....

[*Acknowledgment; Minnesota, North Dakota, South Dakota.*]
[*Venue.*]

On this day of, 19.., before the undersigned, a notary public in and for said county and state, personally appeared N.... O.... and O.... P...., known to me to be the persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free act and deed.

R.... S....,

Notary Public.

[*Justification of sureties; Wisconsin, North Dakota, South Dakota*]:

[*Venue.*]

N.... O.... and O.... P...., being each duly sworn, each for himself says he is one of the subscribers to the foregoing undertaking; that he is a resident freeholder within the state of, and is worth the sum of dollars over and above all his debts and liabilities, in property within the state of, not by law exempt from execution.

N.... O....

O.... P....

[*Jurat.*]

[*Justification of sureties; Minnesota.*]

[*Venue.*]

N.... O.... and O.... P...., the persons named in and who executed the foregoing undertaking, being first duly sworn, each for himself says that he is a resident and freeholder of the state of Minnesota, and worth the amount of dollars, specified in the within undertaking, above his debts and liabilities, and exclusive of his property exempt from execution.

N.... O....

O.... P....

[*Jurat.*]

2361. Undertaking to stay execution on money judgment (Wisconsin, Minnesota, North Dakota and South Dakota).

[*Add to the last preceding form*]: and do also undertake that if the said judgment so appealed from, or any part thereof, be affirmed, the said appellant will pay the amount directed to be

paid by the said judgment, or the part of such amount as to which the said judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against said appellant on the said appeal.

[*Date.*]

[*Signatures, justification and acknowledgment, if required, as in last preceding form.*]

2362. Undertaking when judgment directs delivery of documents or personal property (Wisconsin, Minnesota, North Dakota and South Dakota).¹

[*Title of action in trial court.*]

[*Proceed as in Form 2360 to the * and continue*], wherein it was adjudged that the said defendant assign [*or, deliver*] to the plaintiff certain documents in said judgment described [*or, deliver to the plaintiff certain personal property in said judgment described*] and recover the sum of dollars; and the said defendant being aggrieved thereby intends to appeal to the supreme court of the state of

NOW, THEREFORE, we, N.... O.... and O.... P...., of, in the said county of, do hereby undertake that the said appellant will pay all costs and damages [*in Minnesota, charges*] which may be awarded against him on said appeal not exceeding dollars; and do also further undertake in the sum of dollars [*being the amount directed by the Hon. J.... K...., presiding judge of said court*], that the appellant will obey the order of the appellate court on the appeal.

[*Date.*]

N.... O....

O.... P....

[*Acknowledgment, if necessary, and justification as in Form 2360.*]

2363. The same, when judgment directs sale or delivery of real property (Wisconsin, Minnesota, North Dakota and South Dakota).

[*Title of action in trial court.*]

[*Proceed as in Form 2360 to the * and continue*]: wherein the sale [*or, delivery of the possession*] of certain real property therein described was directed and adjudged, and the said de-

¹ In this and the several following forms for undertakings on appeal in special cases the amount of the undertaking is to be fixed by the court or presiding judge. This may be done by order in

open court to be entered on the minutes when judgment is ordered, or by motion on notice or order to show cause to be followed by a written order.

fendant feeling aggrieved thereby intends to appeal to the supreme court of the state of

NOW, THEREFORE, we, N.... O.... and O.... P...., both of, in the said county of, do hereby undertake that the said appellant will pay all costs that may be awarded against him on said appeal not exceeding dollars, and do also undertake in the sum of dollars [being the amount directed by Hon. J.... K...., presiding judge of said court], that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof pursuant to the judgment.

N.... O....

[Date.]

O.... P....

[Acknowledgment, if necessary, and justification of sureties, as in Form 2360.]

2364. Undertaking on appeal from foreclosure judgment (Wisconsin, North Dakota and South Dakota).

[Title as in trial court.]

Whereas, on the day of, 19.., in the court for county, the above named plaintiff obtained a judgment against C.... D.... of foreclosure and sale, directing the sale of certain mortgaged premises described therein, to satisfy the sum of dollars, and costs; and the defendant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the state of

NOW, THEREFORE, we, N.... O.... and O.... P...., both of, in the county of, state of, do hereby undertake that if the judgment is affirmed, or the appeal dismissed, the appellant will pay any deficiency which may arise on such sale, not exceeding the sum of dollars, being the sum fixed by the Hon. J.... K...., presiding judge of said court, and all costs and damages which may be awarded to the respondent on such appeal.

N.... O....

[Date.]

O.... P....

[Add acknowledgment, if necessary, and justification of sureties, as in Form 2360.]

2365. Undertaking on appeal from judgment abating a nuisance (Wisconsin, North Dakota and South Dakota).

[Title as in trial court.]

WHEREAS [recite the judgment and the particular relief granted by it, as suggested in Form 2360 and proceed]:

NOW, THEREFORE, we, N.... O.... and O.... P...., both of in the county of, do hereby undertake that the appellant will pay all costs and damages that may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; and, also, do further undertake in the sum of dollars [being the amount fixed by Hon. J.... K...., presiding judge of said court], that the appellant will pay all damages which the respondent may sustain by the continuance of such nuisance.

[Date.]

N.... O....

O.... P....

[Add acknowledgment, if necessary, and justification of sureties, as in Form 2360.]

2366. Undertaking in special case (Wis. Stats. 1898 sec. 3059).

[Title as in trial court.]

WHEREAS [recite recovery of judgment and the particular thing required by it to be done or refrained from, as suggested by Form 2360 and follow with the undertaking for costs and damages as in said form, and conclude]: and do also further undertake in the sum of dollars [being the amount fixed by Hon. J.... K...., judge of said court] that the appellant will pay all damages which the opposite party may have sustained by the doing [or, not doing] of [here state the particular act] and that [insert such other requirement as the court or judge has ordered].

N.... O....

O.... P....

[Add acknowledgment, if necessary, and justification of sureties, as in Form 2360.]

2367. Order fixing conditions and terms of undertaking on appeal from an intermediate order (Wisconsin, North Dakota and South Dakota).

[Title as in trial court.]

An order having been made and entered in this action on the day of, 19.., to the effect that [state terms of order], and the defendant being about to appeal therefrom and having applied to me upon due notice to fix the conditions upon which compliance with said order shall be delayed, and to fix the terms, amount and effect of the undertaking, for the stay of the execution of such order until the determination of such appeal, and after hearing counsel for the parties, and being advised in the premises,

On motion of G.... H...., attorney for the defendant,

IT IS ORDERED, that the execution of said order be stayed until the determination of such appeal, upon the following conditions, to-wit [*here specify conditions*].

And it is further ordered, that the said defendant on such appeal cause to be executed on his part and filed an undertaking, by two sufficient sureties in the sum of dollars to the effect that [*here state terms of the undertaking to be given*].

[*Date.*]

J.... K....,

Judge.

[When the order appealed from is made by the court or the judge in the presence of the parties, the defeated party may orally apply for the fixing of the conditions and the same may be included in the order appealed from, and the undertaking should follow the terms of the order.]

2368. Undertaking on appeal from order vacating writ of attachment or injunction (Wisconsin, North Dakota and South Dakota).

[*Title as in trial court.*]

WHEREAS, an order was made in this action on the day of, 19.., vacating [*or, modifying*] the writ of attachment issued in this action [*or, denying, dissolving or modifying an injunction herein*] from which order the plaintiff has given immediate notice of appeal.

NOW, THEREFORE, we, N.... O.... and O.... P...., both of the city of, in county, state of, do hereby undertake, in the sum of dollars [the amount directed by Hon. J.... K...., presiding judge of said court], that if the said order appealed from, or any part thereof, be affirmed, the appellant will pay all costs and damages which may be awarded against him on the appeal, and all which the said defendant may sustain by reason of the continuance of said attachment [*or, the granting or continuance of said injunction*].

[*Date.*]

N.... O....

O.... P....

[Add acknowledgment, if necessary, and justification of sureties, as in Form 2360.]

2369. Order continuing attachment or injunction on giving last preceding undertaking (Wisconsin, North Dakota and South Dakota).

[*Title as in trial court.*]

A writ of attachment against the property of the defendant herein [*or, an injunctional order enjoining and restraining the*

defendant from, *here state act enjoined*, during the pendency of this action] having been issued on the day of, 19..., in this action, and the same having been vacated [*or, modified*] by an order of the court [*or, Hon. J.... K...., the presiding judge of said court*], made on the day of, 19..., and the plaintiff having given immediate notice of appeal from such order, and caused to be executed on his part and filed a sufficient undertaking, pursuant to section of the [*name statutes*] upon such appeal.

On motion of G.... H...., plaintiff's attorney,

IT IS ORDERED, that the said attachment [*or, said injunctive order*] be continued, until the decision of the appeal, unless the defendant shall at any time pending the appeal, give an undertaking, with sufficient surety, in the sum of dollars, to abide and perform any final judgment that shall be rendered in favor of such appellant in this action.

[*Date.*]

J...., K....,

Judge.

2370. Writ of error in civil action (Wis. Stats. 1898 sec. 3043).²

State of, }
Supreme Court. } ss.

The State of, to the Judge of the Court of the County of, in said State.

GREETING: Because, in the record and proceedings, and also in the rendition of judgment, in a suit which was duly tried in the court of county aforesaid, before you, between A.... B...., plaintiff, and C.... D...., defendant, in an action of ejectment [*or, otherwise briefly name the action*], manifest error hath intervened to the great damage of the said C.... D.... as by his complaint we are informed;

And, being willing that the error, if any there be, should in due manner be corrected and full and speedy justice done to the parties aforesaid,

WE DO COMMAND you, that if judgment be thereupon given, then you send to the judges of the supreme court of the state of, distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of

² In Wisconsin the writ of error is preserved by the constitution in both civil and criminal cases. It issues as of course in civil cases, and in criminal cases except in

capital cases, when it must be allowed by a justice of the supreme court on notice to the attorney general. Wis. Stats. 1898 secs. 3043, 4724.

the suit aforesaid, with all things concerning the same, and this writ, so that they may have the same at the next term of our said supreme court, to be held at, in the state aforesaid, on the day of, 19.., that the record and proceedings aforesaid, being inspected, we may cause to be further done, for correcting that error, what of right, and according to law and the rules of our said court, ought to be done.

Witness, the Hon. J.... K...., chief
justice of the supreme court of the
state of, at, this
. . . . day of, 19..

[SEAL OF COURT.]

Attest:

R.... S....,
Clerk.

2371. Bond for costs and damages on writ of error in civil action (Wis. Stats. 1898 sec. 3044).

KNOW ALL MEN by these presents, that we, C.... D...., principal, and N.... O.... and O.... P...., sureties, all of, in the county of, and state of Wisconsin, are held and firmly bound to A.... B.... of, in the sum of two hundred and fifty dollars, lawful money of the United States, to be paid to the said A.... B...., his heirs, executors, administrators, or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals, and dated this day of, 19..

Whereas, the above bounden C.... D.... has sued a writ of error out of the supreme court of the state of Wisconsin, directed to the judge of the circuit court for county, commanding that a transcript of the record in a certain action of [*name it*] between A.... B.... and C.... D.... in said circuit court, wherein judgment was rendered against said C.... D.... on the day of, 19.., be sent to said supreme court,

NOW, THE CONDITION hereof is such that if the said C.... D.... shall well and truly pay all costs, and damages which may be awarded against him on said writ of error, then this obligation shall be void; otherwise of force.

Sealed and delivered in
presence of
[*two witnesses*]

C.... D.... [Seal.]
N.... O.... [Seal.]
O.... P.... [Seal.]

[*Venue.*]

N.... O.... and O.... P...., being first duly sworn, each for himself says that he is one of the subscribers to the foregoing

bond; that he is a resident of the state of Wisconsin and is worth the sum of dollars, over and above all his debts and liabilities, in property within the state of Wisconsin, not by law exempt from execution.

[*Jurat.*]

O.... P....
N.... O....

2372. Supersedeas bond on writ of error in civil action (Wis. Stats. 1898 sec. 3045).

[*Proceed as in last preceding form to the condition, making the penalty double the amount of the judgment and continue*]:

NOW THE CONDITION hereof is such that if the said C.... D.... shall prosecute his action to effect and well and truly pay all costs and damages which may be awarded against him therein, and, in case the judgment of the court below is affirmed, will pay the amount thereof with costs, then this obligation, etc. [*conclude as in last preceding form, and add justification of sureties*].

2373. Supersedeas bond on appeal (Iowa Code sec. 4128).

[*Proceed as in Form 2371 to the words "Whereas the above bounden, etc.," and continue*]:

Whereas, the above bounden C.... D.... has appealed from the judgment of the district court of the state of Iowa, in and for county, rendered on the day of, 19..., in an action then pending in said court wherein said A.... B.... was plaintiff and the said C.... D.... was defendant [*if the appeal be from an order, name and identify it*].

NOW THE CONDITION hereof is such if the said appellant shall pay to the said appellee all costs and damages that shall be adjudged against said appellant on said appeal, and shall also satisfy and perform the said judgment [or order] appealed from, in case it shall be affirmed, and any judgment or order which the supreme court may render or order to be rendered by the said district court, and all rents, or damages to the property during the pendency of the appeal out of the possession of which the appellee is kept by reason of the appeal, then this obligation to be void, otherwise to remain in full force and virtue.

Dated this day of, 19..

C.... D....
N.... O....
O.... P....

[*Add justification of sureties and approval by clerk of trial court.*]

2374. Order staying proceedings (Iowa Code sec. 4128).

The State of Iowa to [*name appellee and all others who are to be notified*].

Whereas, C.... D.... has appealed from the judgment [*or order*] of the district court of county, Iowa, rendered on the day of, 19.., in an action then pending wherein A.... B.... was plaintiff and C.... D.... was defendant; and whereas the said C.... D.... has filed in my office this day a supersedeas bond in said cause with sureties approved by me.

NOW, THEREFORE, you are hereby commanded and required to stay any and all proceedings in said cause under such judgment [*or order*] or so much thereof as is superseded thereby from and after the date hereof, and until said appeal is finally disposed of and determined.

Witness R.... S...., clerk of said court, with the seal thereof hereto affixed, this day of, 19..

R.... S...., Clerk,
District Court County.

[SEAL OF COURT.]

2375. Countermand of execution on filing supersedeas bond (Iowa Code sec. 4130).

The State of Iowa to L.... M...., Sheriff of County, Iowa.

Whereas, C.... D.... has appealed from the judgment of the district court in and for county, Iowa, rendered on the day of, 19.., in an action then pending in said court wherein A.... B.... was plaintiff and C.... D.... was defendant; and whereas, on the day of, 19.., and after the delivery to you of the execution issued on said judgment, the said C.... D.... filed in my office a supersedeas bond in said cause with sureties approved by me.

NOW you are hereby notified that said execution is hereby recalled, and you are commanded to forthwith return the same and take no further proceedings thereunder.

Witness, etc. [*as in last form*].

2376. Supersedeas bond on petition in error (Cobb. Ann. Stats. Nebr. sec. 1597).

[*Title as in trial court.*]

Whereas, on the day of, 19.., the above named C.... D.... filed in the supreme court a transcript and petition in error to obtain the reversal of a judgment rendered in the district court of county, on the day of, 19.., in favor of A.... B.... and against the said C.... D.... for the sum of dollars damages besides costs [*or other-*

wise describe nature of judgment rendered according to the fact];

NOW, THEREFORE, we, C.... D...., as principal, and N.... O.... and O.... P...., as sureties do hereby undertake to said A.... B.... in the sum of dollars [*double the amount of the judgment*] that the said C.... D.... will pay the amount of the said judgment, interest and costs in case the said judgment shall be affirmed in whole or in part in said supreme court [*or insert the appropriate condition as prescribed by sec. 1597 Cobb. Ann. Stats. Nebr.*]

[Date.]

C.... D....

N.... O....

O.... P....

I hereby approve of the execution of the above undertaking and the sufficiency of the sureties thereon, this day of, 19..

R.... S....,
Clerk of the District Court.

2377. Supersedeas bond on appeal in equity (Cobb. Ann. Stats. Nebr. sec. 1704).

[*Proceed as in form 2371 to the words "Whereas the above bounden, etc." and continue*]:

THE CONDITION of the above obligation is such, that whereas, the said A.... B.... did, on the day of, 19.., in the court of county, in the state aforesaid, recover a judgment [*or decree*] against the above bounden C.... D.... for the sum of dollars damages, beside costs of suit [*or otherwise briefly state relief*]; from which said judgment [*or decree*] the said C.... D.... has taken an appeal to the supreme court of said state.

Now, therefore, if the said C.... D.... shall prosecute said appeal without delay and pay all condemnation money and costs which may be found against him on the final determination of the cause in said supreme court [*or insert other appropriate conditions according to the nature of the case as the same are contained in sec. 1704 Cobb. Ann. Stats. Nebr.*] then the above obligation to be void, otherwise to remain in full force and virtue.

C.... D.... [Seal.]

N.... O.... [Seal.]

O.... P.... [Seal.]

[Approval by clerk as in last form.]

CHAPTER CLVIII.

HABEAS CORPUS PROCEEDINGS.

- | | |
|---|---|
| <p>2378. Petition for writ of habeas corpus.</p> <p>2379. The same, when made by third person on behalf of the prisoner.</p> <p>2380. Writ of habeas corpus, statutory form (Wisconsin and Minnesota).</p> <p>2381. Bond to be given when required by officer before service of writ is complete (Wisconsin).</p> <p>2382. Petition where petitioner may be carried out of state or suffer irreparable injury before writ can issue (Wisconsin and North Dakota).</p> <p>2383. Warrant on foregoing petition.</p> <p>2384. Notice to county attorney of issuance of writ (Iowa).</p> <p>2385. Preliminary writ, issued when irreparable injury would be suffered before relief by habeas corpus.</p> <p>2386. Return denying custody.</p> | <p>2387. Return to writ, alleging custody under process.</p> <p>2388. Notice, to party interested, of time and place of return of writ (Wisconsin and North Dakota).</p> <p>2389. Notice to district attorney, where the party is detained on a criminal accusation.</p> <p>2390. Traverse of return to writ.</p> <p>2391. Order of discharge from imprisonment.</p> <p>2392. Order remanding prisoner.</p> <p>2393. Order that prisoner be admitted to bail.</p> <p>2394. Recognizance or bail bond.</p> <p>2395. Attachment for disobedience to writ of habeas corpus.</p> <p>2396. Commitment for disobedience to writ.</p> <p>2396a. Further precept to bring up the person confined.</p> <p>2397. Affidavit for writ of habeas corpus ad testificandum.</p> <p>2398. Writ of habeas corpus ad testificandum.</p> |
|---|---|

The ancient common-law writ of habeas corpus by means of which every imprisoned person has the right to have the cause of his imprisonment judicially examined when he claims it to be illegal and to be freed from such imprisonment when it is found to be illegal, is preserved in all of the states, with some differences in procedure. Wis. Stats. 1898 chap. 147; Minn. Rev. Laws 1905 secs. 4573-4602; N. Dak. Rev. Codes secs. 8648-8688; Iowa Code secs. 4417-4459; S. Dak. Rev. Codes C. P. secs. 771-780; Cobb. Ann. Stats. Nebr. secs. 2487-2510. The proceeding is always commenced by sworn petition by or on behalf of the imprisoned person addressed to a court of competent jurisdiction, or a judge thereof, on which a writ issues directing the person who has the prisoner in custody to bring him before the court or judge in order that the cause of detention may be inquired

into; return is made to the writ and issue, either of fact or law, taken upon the return and tried, and the result is either that the prisoner is discharged or remanded to custody, as his imprisonment is found to be either illegal or legal.

2378. Petition for writ of habeas corpus.¹

To the Court of County, State of [or To Hon. J.... K.... Judge, etc., *give official title*].

THE PETITION of A.... B.... of the city of in the county of and state of respectfully shows that he is imprisoned and restrained of his liberty by L.... M.... at [name place of confinement] in said county. That said A.... B.... is not committed or detained by virtue of the final judgment or order of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon such judgment or order. That the cause or pretense of such confinement or restraint, according to the knowledge and belief of the petitioner, is [here state the cause, and if it be any judicial process or warrant, name the alleged offense and attach a copy of the process or warrant saying, a copy whereof is hereto annexed marked Exhibit A, or if a copy could not be obtained say, that by reason of petitioner being removed or concealed before this application a demand for a copy of said process or warrant could not be made, or that a demand for a copy of said warrant or process was made by your petitioner of the said L.... M.... before this application and the legal fees therefor tendered to said L.... M...., and that such copy was refused].

[If the cause of confinement be unknown insert instead of the foregoing]: That your petitioner is utterly ignorant of the cause or pretense of such confinement or restraint and is unable to ascertain the same.

That the confinement of your petitioner is illegal in this [here state particularly in what respect the confinement is illegal].

[If application is made in another county from that where petitioner is detained, add]: That there is no officer in the said county authorized to grant said writ [except R.... S...., Judge, etc., and that he is now absent from said county

¹ This general form may safely be followed in Wisconsin, Minnesota, North Dakota, South Dakota and Nebraska. In Iowa the petition must also allege that the legality of the imprisonment has not been already adjudged upon any prior proceeding of the same character, to the best of the

knowledge and belief of the applicant, and if application has already been made to any other court or judge and refused, the fact must be stated and a copy of the former petition attached with the reasons for such refusal, or satisfactory reasons given for failure to do so. Iowa Code sec. 4417..

or has refused to grant said writ or is incapable of acting on account of illness].

YOUR PETITIONER therefore prays that a writ of habeas corpus may issue, directed to the said L.... M.... commanding him that he have the body of the said A.... B.... by him imprisoned and detained, together with the time and cause of such imprisonment and detention, before the said court [*or officer, naming him*] to do and receive what shall then and there be considered concerning the said A.... B.... in pursuance of the statute in such case provided.

Dated this day of, 19..

[*Venue.*]

A.... B...., the petitioner named in the foregoing petition, being duly sworn, says that he has read the said petition, and knows the contents thereof, that the same is true of his own knowledge, except as to those matters therein stated upon his information and belief, and as to those matters that he believes it to be true.

A.... B....

[*Jurat.*]

2379. The same, when made by third person on behalf of the prisoner.

[*Address as in preceding form.*]

THE PETITION of C.... D.... of the city of, county of and state of, who makes and verifies this petition on behalf of A.... B.... of, in said county, respectfully shows that said A.... B.... is imprisoned, etc. [*proceed as in last preceding form, substituting the name of the person imprisoned in place of the words "your petitioner" wherever necessary*].

2380. Writ of habeas corpus, statutory form (Wis. Stats. 1898 sec. 3413; Minn. Rev. Laws 1905 sec. 4577).²

In the name of the State of Wisconsin, to the Sheriff of County, Wisconsin [*or L.... M...., the person detaining the petitioner*].

GREETING: You are hereby commanded to have the body of A.... B...., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and de-

² The statutes of Iowa and North Dakota provide forms of writ somewhat different from this form. Iowa Code sec. 4423; N. Dak. Rev. Codes 8653. In Nebraska a special form is provided where the

writ issues to any person other than an officer. Cobb. Ann. Stats. Nebr. sec. 2501. Where no special form is provided the form given in the text may be used.

tention, by whatever name the said A.... B.... shall be called or charged, before J.... K...., judge of the circuit court of county [or county court, or court commissioner in and for county] at [name place] on [name day and hour] [or immediately after the receipt of this writ], to do and receive what shall then and there be considered concerning the said A.... B.... And have you then and there this writ.

WITNESS the Hon. J.... K...., Judge,
[SEAL.] etc., on the day of, 19..

R.... S...., Clerk.

[Allowance indorsed thereon]: The within writ allowed by me this day of, 19.. [and the charges for bringing up such prisoner amounting to dollars are hereby required to be paid by the petitioner, on whose application this writ is issued].

J.... K...., Judge, etc.

2381. Bond to be given when required by officer before service of writ is complete (Wis. Stats. 1898 sec. 3418).

KNOW ALL MEN by these presents, that I, E.... F...., farmer, of the town of, in the county of, am held and firmly bound unto L.... M...., sheriff of said county, in the penal sum of [double the amount of the sum for which the prisoner is detained, if detained for any specific sum, and if not, then for one thousand] dollars, to be paid to the said L.... M...., or to his attorney, executors, administrators, or assigns, for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents.

Sealed with my seal, and dated the day of, 19..

Whereas, A.... B.... is now confined as a prisoner in the custody of the said L.... M...., sheriff, as aforesaid, and a writ of habeas corpus has been issued by J.... K...., Esq., judge, etc. [give title], to inquire into the cause of his detention, directed to the said sheriff.

NOW, THEREFORE, the condition of this obligation is such, that if the said E.... F.... shall pay to the said sheriff the charges for carrying back the said A.... B...., if he shall be remanded on the said habeas corpus, and if the said A.... B.... shall not escape by the way, either in going to, or returning from, the court house in the village of [or, the office of said judge, or other place where the prisoner is required to be taken], then this obligation to be void, otherwise to remain in full force and virtue.

E.... F....

Sealed and delivered in presence
of [two witnesses.]

[Justification as in Form 191.]

2382. Petition where petitioner may be carried out of state or suffer irreparable injury before writ can issue (Wis. Stats. 1898 secs. 3438, 3439; N. Dak. Rev. Codes sec. 8674).

[Add to Form 2378 statement of facts justifying apprehension that prisoner will be carried out of state or suffer irreparable injury, e. g.] :

And your petitioner further shows, that the said L.... M...., in whose custody the said A.... B.... is, has threatened to carry the said A.... B.... out of this state, and has told several persons, publicly, that such was his intention. That your petitioner had a conversation with said L.... M.... this morning, in which he informed your petitioner that he should leave immediately with said A.... B.... for the state of, and that neither your petitioner nor any other person, had power to prevent him from doing so, and your petitioner fears that he [*or, name prisoner*] will be carried out of the state by said L.... M.... [*or, will suffer some irreparable injury*] before he can be relieved by proceeding by habeas corpus.

WHEREFORE your petitioner prays that a warrant be issued to take your petitioner [*or, said prisoner*], [and to arrest said L.... M....] and forthwith to bring him [*or, them*] before this court [*or, before you*], to be dealt with according to law.

A.... B....

[*Verification.*]

[Add corroborating affidavits, if possible.]

2383. Warrant on foregoing petition.

The State of to S.... F...., sheriff of the county of [*or, to any constable of the county of, or any other person*].

Whereas, A.... B.... has applied to me [*or, to the court*] for a warrant to take A.... B...., alleged to be illegally confined by [*or, in the custody of*] L.... M....

And, whereas, it appears from the proofs before me on such application, that, etc. [*reciting the facts*].

And, whereas, it satisfactorily appears to me [*or, to the court*] that the said A.... B.... is held in illegal confinement or custody by the said L.... M...., and that there is good reason to believe that he will be carried out of the state [*or, that he will suffer some irreparable injury*] before he can be relieved by the issuing of a habeas corpus,

NOW, THEREFORE, you are authorized and commanded, forthwith to arrest the said L.... M...., and to take the body of the said A.... B...., and to bring them immediately before

me at my office [*or, before this court, at the court house*] in the city of, in said county, to be dealt with according to law.

Given under my hand and seal, at,
in said county, this day of,

[SEAL.]

19..

J. . . . K. . . . , Judge, etc.

2384. Notice to county attorney of issuance of writ (Iowa Code sec. 4427).

To N. . . . O. . . . , county attorney of county, Iowa:

You are hereby notified that a writ of habeas corpus has been issued by the undersigned [*or by the court of county*] to inquire into the cause of the imprisonment of A. . . . B. . . . , now confined, as it is alleged, by L. . . . M. . . . in [*name place of confinement*]; that said writ is made returnable before me [*or said court*], at [*name place*], in, on the day of, 19.., at o'clock in the noon of said day, when and where you can attend if you think proper.

Dated this day of, 19..

J. . . . K. . . . , Judge, etc.

2385. Preliminary writ, issued when irreparable injury would be suffered before relief by habeas corpus (Iowa Code secs. 4437, 4438).

The State of Iowa to the sheriff of county [*or such other person as is named by the court*].

GREETING: Whereas, A. . . . B. . . . has applied to me for a writ of habeas corpus to inquire into the detention of A. . . . B. . . . , alleged to be illegally restrained of his liberty by L. . . . M. . . . at [*name place of confinement*].

And whereas, it satisfactorily appears to me that the said A. . . . B. . . . will suffer irreparable injury before he can be relieved by issuing the ordinary writ of habeas corpus. You are, therefore, hereby commanded that you forthwith take the said A. . . . B. . . . and bring him before me to be dealt with according to law.

[*If it satisfactorily appears that the person detaining the prisoner has committed a crime in connection with the illegal detention add*]: And whereas it further satisfactorily appears to me that the said L. . . . M. . . . has committed the crime of [*name the offense*] in connection with the illegal detention of the said A. . . . B. . . . , you are, therefore, hereby commanded forthwith to arrest the said L. . . . M. . . . and bring him before me to be dealt with according to law, and have you then and there this writ with a return hereon of your doings in the premises.

Witness my hand this day of, 19..

2386. Return to writ, denying custody.[*Venue.*]

The return of L.... M...., sheriff of the county of, to the writ of habeas corpus hereto annexed.

In obedience to the writ of habeas corpus hereto annexed, I do hereby certify and return to the court [*or officer allowing the writ*], * that neither at the time of the allowance of the said writ, nor at any time since, was the said A.... B...., therein mentioned, by whatever name he may be called, in my custody, possession, or power, or restrained by me of his liberty; wherefore I cannot have his body before you as by the said writ I am commanded.

L.... M...., Sheriff, etc.

[*If the person making the return is not a sworn public officer, add verification.*]

2387. Return to writ, alleging custody under process.

[*As in last preceding form to the *, continuing*]: that before the coming to me of the within writ, the said A.... B.... was committed to my custody [*or, was arrested by me*], and is detained by virtue of an order of arrest [*or otherwise designate the warrant according to the fact*], to me directed, a copy of which annexed I transmit to you. Nevertheless, I have the body of said A.... B.... before you at the day and place within mentioned, as I am within commanded.

[*Date.*]

L.... M...., Sheriff, etc.

2388. Notice, to party interested, of time and place of return of writ (Wis. Stats. 1898 sec. 3432; N. Dak. Rev. Codes sec. 8669).

STATE OF

..... Court County.

The state of on the
relation of A.... B....,
Plaintiff.

vs.

L.... M....,
Defendant.

[*Or if before a judge omit name of court and say, Before Hon. J.... K...., Judge, etc.*]

TAKE NOTICE, that a writ of habeas corpus has been issued by [*designating the court, or officer*] to inquire into the cause of the imprisonment or restraint of A.... B...., now confined [in the jail of county, * under process] in which you have, or claim [*or, the said G.... H.... has or claims*] some

interest; * and that the said writ is made returnable before the said court [*or, officer*], at the court house [*or, at his office*] in, on the day of instant, at o'clock in the noon [and that the application will be heard upon the writ and return thereto before said court,—*or, officer*,—at the court house—*or, at his office*—in, on the day of, 19. . ., at o'clock in the noon].

[*Date.*]

G. . . . H. . . . ,
Attorney for Relator.

[*Address to the party in
interest, or to his attorney
if he have one.*]

2389. Notice to district attorney, where the party is detained on a criminal accusation.

[*As in preceding form, substituting for the words between the **, the words "under a criminal accusation, to-wit, of"*]

2390. Traverse of return to writ.

[*Title as in Form 2388.*]

A. . . . B. . . . , by this his answer to the return of L. . . . M., sheriff of the county of, denies [*or, alleges*], etc. [*here set forth matter in answer to the return*].

[*Add verification.*]

A. . . . B. . . .

2391. Order of discharge from imprisonment.

[*Title as in Form 2388.*]

It appearing on the return of the writ of habeas corpus allowed by me [*or, by this court*], that A. . . . B. . . . * is illegally imprisoned [*or, detained*] by you [*here may be stated in the words of the statute the class of cases in which a discharge is allowed*]; You are, therefore hereby commanded [*or, I do therefore command you*] forthwith to discharge him from your custody.

Witness Hon. J. . . . K. . . . , judge of said court, this day of, 19. . .

[*SEAL.*]

[*Signature of clerk, or, if the proceeding
be before a judge out of court, signature
of judge.*]

[*Address to sheriff or other
officer having custody of
the prisoner.*]

2392. Order remanding prisoner.

[*As in preceding form to the *, continuing*]: is legally detained in custody, by virtue of an execution issued upon a final

judgment rendered in the court in favor of A.... G.... as plaintiff, against the said A.... B...., as defendant [*or, by virtue of a commitment for a contempt issued by the court, in which commitment the said contempt is specially and plainly charged, the said court having authority to commit for the contempt, so charged, or otherwise, according to the statute*].

ORDERED, that the said A.... B.... be, and he is hereby, remanded to his former imprisonment under the execution [*or, commitment aforesaid*].

Witness, etc. [*conclude as in last preceding form*].

2393. Order that prisoner be admitted to bail (Wis. Stats. 1898 sec. 3429; Minn. Rev. Laws 1905 sec. 4588; N. Dak. Rev. Codes sec. 8664; S. Dak. Rev. Code C. P. secs. 773, 774; Iowa Code sec. 4453; Cobb. Ann. Stats. Nebr. sec. 2491).

[*Title as in Form 2388.*]

[*Proceed as in Form 2391 to the * and continue*]: is detained in the custody of the sheriff of the county of, under a commitment in which the said A.... B.... is charged with the offense of [grand larceny]; and that the said A.... B.... is entitled to bail: It is, therefore,

ORDERED, that the said A.... B.... be held to bail for his appearance at the next court of, to be held in and for the county of, in the sum of dollars.

And it is further ordered, that upon such bail being forthwith entered into, in conformity to this order and the provisions of law, that the said A.... B.... be discharged, and in default of such bail that he be remanded to the custody of said sheriff.

Witness, etc. [*conclude as in Form 2391*].

2394. Recognizance or bail bond.

[*Title.*]

[*Venue.*]

Be it remembered, that, on the day of, 19..., A.... B...., of, in said county, and E.... F...., farmer, and G.... H...., merchant, of the same place, personally appeared before [*naming officer*] and severally and respectively acknowledged themselves to be indebted to the state of in the sum of dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

Whereas, the above named A.... B.... is in the custody of the sheriff of said county under a commitment from [*name offi-*

cer], from which commitment it appears that the said A.... B.... is charged with the crime of [grand larceny], committed within said county.

NOW, THEREFORE, the condition of this recognizance is such, that, if the said A.... B.... shall personally appear at the next term of the court, to be held in and for said county of, then and there to answer to an indictment [*or* information] to be preferred against him for the said offense, and further to do and receive what shall, by the said court, be then and there enjoined upon him, and shall not depart the said court without leave; then this recognizance to be void; otherwise to remain in full force and virtue.

A.... B.... [Seal.]

E.... F.... [Seal.]

G.... H.... [Seal.]

Taken, subscribed, and acknowledged, before
me, by the said A.... B...., E....
F...., and G.... H...., the day and
year first above written.

[*Signature of judge.*]

[*Add justification of sureties as in Form 191.*]

2395. Attachment for disobedience to writ of habeas corpus.

The State of to the Sheriff of the County of

GREETING: It appearing satisfactorily to me [*or*, to the court], by sworn proof that L.... M...., to whom a writ of habeas corpus was directed and delivered, commanding him to bring before me [*or* the court] A.... B...., in the said writ named, has neglected [*or*, refused] to obey the said writ according to the command thereof, by not producing the said A.... B.... before me, and also by not making a return [*or*, a full and explicit return] to such writ within the time limited by law; and no sufficient excuse having been shown for such neglect [*or*, refusal].

NOW, THEREFORE, you are authorized and commanded, forthwith to arrest the said L.... M...., and to bring him immediately before me at my office, in the village of, in said county [*or*, before this court at the court house, in].

Witness, etc. [*as in Form 2391*].

2396. Commitment for disobedience to writ.

The State of to the Sheriff of the County of

GREETING: Whereas, L.... M.... has been brought before me [*or*, this court] on a warrant issued by me [*or*, the court], stating that the said L.... M.... [*etc.*, reciting its substance].

And whereas the said L.... M.... still refuses to obey the said writ of habeas corpus, by producing the body [*or, by certifying the day and cause of the imprisonment*] of the said A.... B.... as therein required, and by not making a return [*or, a full and explicit return*] to such writ of habeas corpus.

NOW, THEREFORE, you are authorized and commanded, forthwith to convey the said L.... M.... to the jail of said county, and there commit him to close custody in such jail, there to remain until he shall make return to the writ in such warrant mentioned [*and also comply with the order this day made, if any, designating it*].

Witness, etc. [*as in Form 2391*].

2396a. Further precept to bring up the person confined.

The State of to the Sheriff of the County of

GREETING: Whereas, a writ of habeas corpus has heretofore been issued by this court [*or, by me*] directed to L.... M...., in which he was commanded to have the body of A.... B...., by him imprisoned and detained as it was said, together with the time and cause of such imprisonment, and which writ has been duly served upon the said L.... M...., and whereas, the said L.... M.... has neglected [*or refused*] to produce the body of the said A.... B...., according to the command of said writ; and for which neglect [*or, refusal*] an attachment has been issued against the said L.... M....

NOW, THEREFORE, you are commanded forthwith to bring the said A.... B.... before me, at my office, in the city of, in said county [*or, before this court, at the court house, in*].

Witness, etc. [*as in Form 2391*].

2397. Affidavit for writ of habeas corpus ad testificandum
(Wis. Stats. 1898 sec. 3449; N. Dak. Rev. Codes sec. 8688; S. Dak. Rev. Code C. P. sec. 789).

[*Title of action.*]

[*Venue.*]

A.... B...., being duly sworn, says he is the plaintiff in the above entitled action which is brought by him to recover upon a certain promissory note executed by the defendant [*describing it*] [*or otherwise state the nature of the action*]. That the defense in said action is [*state nature of defense*].

That the affiant has fully and fairly stated the case in this action to E.... F...., Esq., who resides at, and also the facts which he expects to prove by one A.... B...., and that he is advised by his said counsel and verily believes that the testi-

mony of the said A.... B.... is material and necessary for him upon the trial of this action, without which he can not safely go to trial.

That the said A.... B.... is now a prisoner in the custody of L.... M...., sheriff of county, and confined in the jail of said county, at; and that as affiant is informed and believes, the cause of his detention and confinement is [*state same*].

That this cause is on the calendar for trial at the present term of this court and that this application is made in good faith to procure the attendance of said witness on said trial and without collusion between affiant and said A.... B....

A.... G....

[*Jurat.*]

[*Allowance to be indorsed*]: Upon the within affidavit let the writ of habeas corpus *ad testificandum* be issued.

[*Date.*]

J.... K...., Judge.

2398. Writ of habeas corpus ad testificandum.

The State of to the Sheriff of County,

GREETING: We command you that you have the body of A.... B...., detained in your custody in the jail of said county as it is said, under safe and secure conduct before our said court for county, at the court house in, in said county, on the day of, 19.., to testify and give evidence in a certain cause now pending in said court and then to be tried between A.... G.... and C.... D....; and immediately after he shall have given such testimony therein, that you return him to said jail under safe and secure conduct. And have you then and there this writ.

Witness, the Hon. J.... K....,
presiding judge of said circuit court,
for the county of, at the court
house in the of, on said
.... day of, 19..

[SEAL OF COURT.]

R.... S...., Clerk

CHAPTER CLIX.

CERTIORARI.

- | | |
|---|---|
| 2399. Petition for writ of certiorari to justice of the peace, general form. | 2406. Writ of certiorari to review removal of officer. |
| 2400. Undertaking to stay execution on certiorari to justice (Wisconsin). | 2407. Return of justice to writ, general form. |
| 2401. Petition for writ of certiorari reviewing action of common council of city in laying out a street. | 2408. Return by city clerk to writ of certiorari. |
| 2402. Petition for writ of certiorari to village clerk, to review proceedings of village board of equalization. | 2409. Order superseding writ for misdirection. |
| 2403. Notice of application for writ of certiorari. | 2410. Judgment quashing writ. |
| 2404. Writ of certiorari to justice (Wisconsin). | 2411. Judgment of affirmance or reversal on certiorari to justice of the peace. |
| 2405. Writ of certiorari to a city clerk to review action of a board of review which has dissolved. | 2412. Judgment reversing action of a board. |
| | 2413. Petition for certiorari in aid of writ of error, alleging diminution of the record. |
| | 2414. Writ of certiorari in aid of error, issued on the foregoing petition. |
| | 2415. Indorsement of allowance of foregoing. |
| | 2416. Return thereto. |

The common-law writ of certiorari was a writ issuing out of the court of chancery or King's Bench addressed to an inferior court, tribunal or officer exercising powers judicial in their nature, commanding the latter to return the records in a cause or proceeding to the superior court in order that they might be reviewed and the determination reversed if there was lack of jurisdiction in the inferior court or tribunal. It lies only in the absence of other speedy and adequate remedy, does not issue of course, but only in the sound discretion of the court; it is also used as ancillary to an appeal, writ of error or other extraordinary writ, for the purpose of bringing up the record when it be not present or suggestion of diminution of the record has been made. *State ex rel. v. Johnson*, 103 Wis. 591 s.c. 79 N. W. 1081.

The power to issue the writ is generally given in express terms to courts of general jurisdiction as well as to the supreme court, either by constitution or statute, or both. Const. Wis. art. VII secs. 3, 8; Wis. Stats. 1898 secs. 2406, 2420; Minn. Rev. Laws

1905 secs. 72, 92; Const. Iowa art. V sec. 4; Iowa Code sec. 4154 et seq.; Const. N. Dak. art. 4 secs. 87, 103; N. Dak. Rev. Code sec. 6098 et seq.; Const. S. Dak. art V secs. 3, 14; S. Dak. Rev. Codes C. P. sec. 754 et seq. In Nebraska the writ is abolished, but courts are given the power to exercise the same power by ordinary action. Cobb. Ann. Stats. Nebr. sec. 1608.

The writ is obtained by application to the court or judge on a sworn petition or affidavit; a return is made to the writ by the officer, court or board to whom it is directed embodying a transcript of the record in the matter and the judgment either affirms, reverses or annuls the determination below.

If misdirected the writ may be superseded on motion before return; it may be also quashed after return for the same reason, or for the reason that upon the facts the writ ought not to have issued in the proper exercise of judicial discretion; but if heard upon the merits the determination below is either affirmed, reversed or annulled unless by statutory provision some other disposition, such as modification, be allowed.

There is some confusion in the precedents as to the manner in which the proceedings and papers in an action or proceeding of certiorari should be entitled, but in the opinion of the writer the better course is to entitle them "State of ex rel. C.... D.... v. L.... M.... [*name officer or officers to whom writ is directed*], respondent," except when the writ is directed to a justice of the peace to reverse a judgment in an action before him, in which case it should be directed "State of on the relation of C.... D...., plaintiff in error, v. A.... B.... [*judgment creditor*], defendant in error."

If the writ be desired to review the proceedings of a permanent body or board, such as a board of aldermen, it should be directed to and served upon the board, but if it is desired to review the proceedings of a temporary body which has completed its labors and dissolved, such as a board of equalization, the writ should be directed to the officer who has legal custody of the records [but see Laws Wis. 1901, chap. 146].

2399. Petition for writ of certiorari to justice of the peace, general form.

[Venue.]

To the Court of County.

THE PETITION of C.... D.... of respectfully represents that on the day of, 19.., one L.... M...., a justice of the peace in and for said county, rendered a judgment against your petitioner, and in favor of one A.... B.... and against your petitioner for the sum of dollars,

damages, and dollars, costs, in a certain action then pending before said justice wherein said A.... B.... was plaintiff and your petitioner was defendant.

That, as your petitioner is informed and verily believes, the said judgment is void for the following reasons, to-wit [*here state facts clearly showing that the justice had no jurisdiction to render the judgment*].

YOUR PETITIONER therefore prays that a writ of certiorari may be issued out of this court to the said L.... M...., justice of the peace, to the end that this court may be certified of all the proceedings in said action, and the said pretended judgment against your petitioner be duly reversed.

C.... D....

[*Add verification as in case of a pleading.*]

[*Allowance to be indorsed on petition*]: The writ of certiorari is hereby allowed and ordered to issue as prayed in the within petition.

[*Date.*]

J.... K....,

Circuit Judge.

[*In Iowa add an allegation to the effect that the petitioner has no plain, adequate and speedy remedy at law for the injury done him except by certiorari.*]

2400. Undertaking to stay execution on certiorari to justice
(Wis. Stats. 1898 sec. 3756a).

[*Title.*]

Whereas C.... D.... has applied for and obtained a writ of certiorari, directed to L.... M...., commanding him to certify to the circuit court of county, the judgment, together with all the files, entries, papers used or made in the action wherein A.... B.... was plaintiff, and C.... D.... defendant, which judgment was rendered on the day of, 19.., for the sum of dollars, damages, and dollars, costs, in favor of said A.... B.... and against said petitioner;

NOW, THEREFORE, we, N.... O...., of, and O.... P...., of, do hereby undertake that if the said writ shall be quashed or superseded, or if the judgment shall be affirmed and execution thereon be returned unsatisfied, in whole or in part, we will pay the amount unsatisfied.

Dated this day of, 19..

N.... O....

O.... P....

[*Add justification as in Form 191.*]

Approved as to form and sufficiency of sureties this day of, 19..

J.... K...., Circuit Judge.

[*or A.... M...., Justice of the Peace.*]

2401. Petition for writ of certiorari reviewing action of common council of city in laying out a street.

[Venue.]

To the Court of County.

THE PETITION of C.... D.... respectfully represents that the city of, in said county, is and was at the times hereinafter stated, a municipal corporation organized and existing under the laws of the state of, possessing the power to lay out streets and highways, and the other usual rights and powers incident to such corporations.

That the petitioner is now, and was at the dates hereinafter mentioned, a taxpayer and resident of said city, and the owner in fee simple of certain lands described as follows [*describe property through which street is laid*].

That upon the day of, 19.., a petition of the required number of taxpayers of said city was presented to the common council thereof, praying for the laying out and opening of a highway in said city, described as follows [*insert description of proposed highway, showing that the same crosses the land of petitioner*]; that such proceedings were thereafter taken upon said application; that twelve jurors were, on the day of, 19.., appointed by the court to view the said premises so proposed to be taken, and determine whether it was expedient and necessary to take the same for the purposes of a street; that [*set out in detail the proceedings of the jury, with their report or verdict, and the final action taken by the council thereon laying out the street*]; that the said resolution of the said common council, in form laying out the said street or highway across the petitioner's premises, were and are irregular, illegal and void, for the following reasons [*here state the facts showing that the proceedings were void or outside of the jurisdiction, such as the lack of necessary answer, etc.*]

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of this court to the said common council, to the end that this court may be certified of all the proceedings had in said matter, and that the pretended resolution laying out said street or highway may be reversed and held for naught.

C.... D....

[Add verification as in case of a pleading.]

[Add indorsement of allowance, as in Form 2399.]

2402. Petition for writ of certiorari to village clerk, to review proceedings of village board of equalization.

[Venue.]

To the Court of County.

THE PETITION of C.... D...., of, respectfully

represents that he is, and was at the times hereinafter mentioned, a resident and taxpayer of the village of in said county, and that on or about the day of, 19.., he delivered to L.... M...., assessor of said village, a statement of the personal property of your petitioner subject to taxation in said village, duly verified, in which it was stated that the average amount of notes, bonds, mortgages and other securities for debts due or to become due your petitioner, was the sum of dollars; that thereafter the said assessor unlawfully and wrongfully increased the said sum of dollars, as shown by petitioner's said statement, to the sum of dollars, without notice to your petitioner, and without testimony; and that thereafter, and upon the day of, 19.., the board of review of said village, consisting of [*name board*], without further evidence, passed on said item of notes, bonds, mortgages and other securities owned by your petitioner, at the sum of dollars; that the said action of the said board of review was illegal and void, for the following reasons [*state reasons in detail*].

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of this court to L.... M...., the village clerk of said village, in whose custody are the records of the said board of review, to the end that this court may be certified of the proceedings in the matter of the said assessment and review, and that the said action of the said board of review may be reversed and set aside.

C.... D....

[*Add verification and allowance as in last preceding form.*]

2403. Notice of application for writ of certiorari.¹

[*Title.*]

Take notice, that on the verified petition of C.... D...., of which the within is a copy [*or, of which a copy is annexed*], the undersigned will move the court of, at a special term to be held at, on the day of, 19.., at o'clock in the noon, or as soon thereafter as counsel can be heard, for the allowance of a writ of certiorari [*here state the object,—e. g., thus:*] requiring you [*name body or officer*] to certify and return the record and proceedings [*or, a transcript of the record and proceedings*] in that certain action lately pending before you [*describe same*] [*or, in that certain proceeding before you, describe proceeding with certainty*].

[*Date.*]

G.... H....

To [*name officer or board*].

¹ The writ may issue without notice or the court may require notice of motion or issue an order to show cause.

2404. Writ of certiorari to justice (Wisconsin).

[Venue.]

The State of Wisconsin to L.... M...., Justice of the Peace of the Town of in said County.

WHEREAS, it has been represented to this court by the verified petition of C.... D.... of, on file herein, that on the day of, 19.., you, as justice of the peace of said town of, rendered a judgment in form against the said C.... D.... and in favor of one A.... B.... for the sum of dollars, damages and costs, in a certain action then and there claimed to be pending before you in which said A.... B.... was plaintiff and said C.... D.... was defendant;

And whereas, it has been further represented to this court by said petition that said judgment, so in form rendered, was and is irregular, erroneous and void for the following reasons [*state the reasons concisely as set forth in the petition*];

And being willing for certain reasons that the record and proceedings in said action upon which said pretended judgment is based, together with the said judgment itself, should be certified and returned by you into our said court,

WE DO HEREBY command you that you do certify and return into this court within days after the service of this writ upon you a correct transcript of the record and proceedings in said action, and all process, pleadings, docket entries and papers filed therein, to the end that our said court may further act thereon as of right and according to law ought to be done; and have you then and there this writ.

Witness the Hon. J.... K...., judge, etc., and the seal of said court this day of,

[SEAL]

19..

R.... S....,
Clerk, etc

[*Indorsement of allowance*]: On the application of G.... H...., attorney for C.... D...., and upon the petition of C.... D...., dated the day of, 19.., I allow the within writ of certiorari to issue.

[*Signature of judge.*]

[*In North Dakota, South Dakota and Iowa the writ should be made returnable at a specified time and place. In North Dakota and South Dakota if a stay of proceedings is desired the following command should be inserted in the writ: And you are further commanded and required to desist from further proceedings in the said action.*]

2405. Writ of certiorari to a city clerk to review action of a board of review which has dissolved.

[Venue.]

The State of to L.... M...., Clerk of the City of
in said County.

WHEREAS, it has been represented to this court by the verified petition of C.... D...., on file herein, that on the day of, 19.., at, in said county, the board of review of said city of made and entered upon the assessment roll of said city an illegal and unjust assessment of the personal property of said petitioner, for the purposes of taxation, at the sum of dollars, which assessment so made was and is excessive, erroneous and void because [*here state facts relied on to prove it void*];

And being willing for certain reasons that the proceedings of the said board of review, had in relation to said matter and upon which said void assessment is founded, should be certified and returned by you into our said court;

WE DO COMMAND you that you do certify and return into this court within days after the service of this writ upon you, the said action and decision of said board, a correct transcript of so much of the assessment roll of the assessor of said city for the year 19.., as relates to the said assessment, papers, entries recorded, entered and filed or used in relation to the review of the assessment of the said property and the property of said relator and his application for such review [*specifying any particular documents or papers*], so that this court may further act thereon as of right and according to law ought to be done. And have you then and there this writ.

Witness, the Hon. J.... K....,
judge of said circuit court, and the
seal of said court, at the of
....., in said county of,
this day of, 19..

[SEAL OF COURT.]

R.... S....,
Clerk.

[Allowance as in last preceding form.]

[See addendum to last preceding form.]

2406. Writ of certiorari to review removal of officer.

[Venue.]

The State of to the Board of Police Commissioners of the
City of

WHEREAS, it has been represented to us by the verified petition of C.... D.... that lately before you, or a majority

of you, composing at the time the board of police commissioners of, etc. [*name body*], such proceedings have been had that you, or a majority of you, have irregularly and without authority or jurisdiction in the premises, discharged, dismissed, and removed from office, R.... G...., a policeman duly appointed and holding office in the said city; and whereas, it is alleged by said R.... G.... that your proceedings have been irregular, without authority, and in violation of the provisions of law, in this [*state specifically the violations alleged*].

And being willing for certain reasons that all the proceedings concerning said dismissal, discharge, and removal from office of said R.... G.... before you remaining, with all the proceedings thereto appertaining, should be certified and returned by you, into our said court, at a general term of said court, to be held at, in, on the day of next,

WE DO COMMAND you, that you certify and return into our said court, at a general term of said court, to be held at the place, and on the day last aforesaid, at the opening of the court on that day, a correct transcript of all the proceedings concerning the said dismissal, discharge, and removal from office of the said R.... G...., had, and taken by, and remaining before you, so that our said court may further act thereon as of right and according to law ought to be done; and have you then and there this writ.

Witness Hon. J.... K...., judge of our said court, at in, the day of, 19..

By the Court:

[SEAL.]

R.... S....,

Clerk, etc.

[*Indorse allowance as in Form 2404, and note also addendum to that form.*]

2407. Return of justice to writ, general form.

The execution of the within writ appears by the following schedule.

L.... M....,
Justice of the Peace.

SCHEDULE.

[Venue.]

I, L.... M...., justice of the peace of the town of, in said county, in pursuance of the command of the within writ to me directed, do hereby certify and return to the court of county, that on the day of, 19.., upon the application of A.... B...., I issued a summons [*or, upon the affidavit of A.... B.... I issued a warrant*] directed to the

sheriff or any constable of the county of and delivered the same to [*name officer*], a true copy of which summons [*or, warrant*] so issued is attached hereto, marked Exhibit A and made part of this return; that thereafter said summons [*or, warrant*] was returned to me with a return of service indorsed thereon, a copy of which return is attached hereto, marked Exhibit B and made a part of this return. That on the return day of said summons the parties appeared at my office [*here state appearance of parties according to fact*].

That all the proceedings in said action required by law to be entered in my docket were duly entered therein and that a true copy of said docket entries is hereto annexed, marked Exhibit C and made part of this return.

That true copies of the written pleadings made and filed in said cause and referred to in said docket are hereto annexed marked, respectively, Exhibits D and E, and that the judgment entered is shown in said docket.

I further certify and return that attached hereto are true copies of all papers filed in said action marked, etc.

Which said transcript of the process, pleadings, docket entries and papers filed in said action are sent in obedience to said writ, and I certify that I have compared the same with the originals thereof, and that each of the copies sent herewith is a true copy of the original and of the whole thereof and the indorsements thereon.

Given under my hand, this day of, 19..

L.... M....,
Justice of the Peace.

2408. Return by city clerk to writ of certiorari.

[*Venue.*]

I, L.... M...., city clerk of the city of, pursuant to the command of the within writ of certiorari to me directed, do hereby certify and return to the court of county:

That the board of review of said city, consisting of [*name of-icers*] met at [*name place and time*] pursuant to law, and that I, as city clerk of said city, acted as clerk of said board and kept a full and true record of its proceedings, a true copy of which record so kept is attached hereto and made a part of this return and marked Exhibit A. That I also kept a record of all testimony taken before said board in the matter of the assessment of the property of C.... D...., the relator, and that a true copy of said testimony with a true copy of the decision of said board of review thereon is attached hereto and made part of this return and marked Exhibit C.

That I have carefully compared all of said copies of said record, proceedings, testimony and decision with the originals on file in my office and that the same constitute a full, correct and complete transcript of the record and proceedings in the matter referred to and described in said writ.

Given under my hand this day of, 19..

L.... M....,

City Clerk.

2409. Order superseding writ for misdirection.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the above named respondent, that the writ of error issued by this court herein on the day of, 19.., be superseded, coming on to be heard, G.... H...., Esq., appearing for the motion and E.... F...., Esq., in opposition thereto; and it appearing that said writ was wrongly directed to the said respondent and should have been directed to [*name proper officer or board*];

IT IS ORDERED, that the said writ be and is hereby superseded and that the said relator, A.... B...., pay to the said respondent dollars, the costs of this motion.

By the Court:

J.... K...., Judge.

2410. Judgment quashing writ.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the respondent [*or, defendant in error*] to quash the writ of certiorari issued herein to L.... M...., justice of the peace, dated, 19.., coming on to be heard, G.... H...., Esq., appearing for the motion and E.... F...., Esq., in opposition, and the court being advised in the premises;

IT IS ADJUDGED, that said writ be and the same hereby is quashed and that the said respondent do recover of the said relator the sum of dollars, costs and disbursements in this action as taxed.

By the Court:

R.... S...., Clerk.

2411. Judgment of affirmance or reversal on certiorari to justice of the peace.

[*Title.*]

[*Caption as in Form 7.*]

This action coming on to be heard upon the return of [*name officer*] to the writ of certiorari issued herein, 19..; the said relator appearing by G.... H...., Esq., his attorney, and the said respondent [*or, defendant in error*] by E.... F....,

Esq., his attorney, the court being now fully advised in the premises, and it appearing that the judgment rendered by L.... M...., Esq., justice of the peace, on the day of, 19.., in favor of said respondent and against said relator for, dollars, damages and costs, in that certain action then pending before said justice wherein said respondent was plaintiff and said relator defendant is manifestly good and valid in law [*or, void because rendered without jurisdiction*];

IT IS ADJUDGED that said judgment be and the same is hereby in all things affirmed [*or reversed, in North Dakota and South Dakota, annulled*] and that the said recover of the said his costs and disbursements herein taxed at dollars.

By the Court:

R.... S...., Clerk.

2412. Judgment reversing action of a board.

[*Title.*] [Caption as in Form 7.]

The above entitled action coming on to be heard upon the return of the respondent to the writ of certiorari issued herein on the day of, 19.., E.... F...., Esq., appearing for the relator and G.... H...., Esq., for the respondent, and the court being fully advised, and it appearing that the action of the [*here name board or officers and specify the action attacked*] was illegal and without jurisdiction;

IT IS ADJUDGED that the said action of the said board [*describing it*] be and the same is hereby reversed and set aside [*in North Dakota and South Dakota, annulled*] [*with costs, taxed at dollars*].

By the Court:

R.... S...., Clerk.

2413. Petition for certiorari in aid of writ of error, alleging diminution of the record.

[*Title of action in which writ of error has issued.*]

To the Honorable the Judges of the Supreme Court of the State of

THE PETITION of A.... B...., the plaintiff in error above named, respectfully shows and represents to the said court:

That he was indicted and convicted in the court, of the county of, for the murder of one S... S...., and was sentenced by the said court to be imprisoned, etc.

That an application was made on his behalf to Honorable J.... K...., one of the justices of the supreme court of the state of, for the allowance of a writ of error, to review

the record and proceedings of the said court which were had in his case, also for a stay of execution under the provisions of the statutes of the state in such case made and provided, and that the said judge did stay the said execution, and allow said writ of error, and made it returnable to said supreme court on the day of, instant, on which day a return was made to the same by H.... V...., clerk of the said [*trial court*], and said writ and return was filed in the office of the clerk of said supreme court;

And your petitioner further states [that none of the matters specified in the said notice have been returned with the said writ of error, and] that there is a diminution and defect in the return, made to the said writ of error, of the following matters and things, all of which constitute a part of the record of the said [*trial court*] in the case of your petitioner, and which he is advised should be returned according to law, and the return of which are essential and necessary to enable this court to correct and redress the errors which it is alleged have happened in the said [*trial court*] in the trial and proceedings had in the case of your petitioner.

And your petitioner specifies the diminution in the matters returned in obedience to the requirements of the said writ of error, to be as follows [*designating each matter*].

YOUR PETITIONER, therefore, asks that a writ of certiorari may be issued by this court, directed to the said clerk of the said [*trial court*], requiring him to certify to the said supreme court the diminution in the record and proceedings of all the matters specified and enumerated in this petition, and that the said clerk be directed to return the same to this court, according to the command of the writ.

A.... B....

[*Add verification as in case of a pleading.*]

2414. Writ of certiorari in aid of writ of error, issued on the foregoing petition.

The State of to the Clerk of the Court of the County of

WHEREAS, a writ of error was allowed by Hon. J.... K...., one of the justices of the supreme court, directed to the clerk of the court of county, wherein A.... B.... was plaintiff in error, and the state of defendant in error, which writ was made returnable to this court on the day of, instant, and which writ was returned by the said clerk on the said last-mentioned day, together with the record of the trial, and conviction of the said A.... B...., of the felony

of murder, and the judgment of the said court thereon; and whereas it has been alleged by the petition of said A.... B.... that there is a diminution in the record and the matters returned by the said clerk, with the said writ of error, which, it is suggested to the court here, are necessary to be returned, in order that it may correct and redress the errors which it is alleged have happened in the said court of county in the trial and proceedings in the case of the said A.... B....; and whereas it is alleged that the diminution in the said record and proceedings consists in the omission to return the following matters and things, to-wit [*designating each*].

WE THEREFORE command you, the said clerk of the court of county, that you distinctly and plainly, under the seal of the court of county aforesaid, and under your certificate as the clerk thereof, forthwith send to a general term of the supreme court of the state of, now being holden in the city of, all the matters and things hereinbefore specified and mentioned, and constituting, as it is alleged, the diminution of the record and proceedings had in the case of the said A.... B...., in the said court of county, together with this writ thereto annexed; so that our said court may further act therein as of right and according to law ought to be done; and have you then and there this writ.

Witness J.... K..., Esq., chief justice of
our said supreme court at, on the

[SEAL.]

.... day of 19..

R.... S....,

Clerk.

2415. Indorsement of allowance of foregoing.

The foregoing writ of certiorari is allowed according to its terms, but without prejudice to any questions, and we direct that the same be sealed and signed by the clerk of the supreme court.

[Date.]

By the Court:

J.... K..., Judge.

2416. Return thereto.

Pursuant to the writ of certiorari hereunto annexed, the undersigned, clerk of the court of county, hereby returns to the supreme court of the state of [*here designate the papers annexed*].

[SEAL.]

Given under my hand, and attested by the seal
of the court, this day of, 19..

R.... S...., Clerk.

CHAPTER CLX.

MANDAMUS.

- | | |
|---|--|
| <p>2417. Petition for writ of mandamus, outline form.</p> <p>2418. Petition for mandamus against officers of a city, to compel levy of a tax to pay a judgment.</p> <p>2419. Order that alternative writ issue.</p> <p>2420. Alternative writ of mandamus.</p> <p>2421. The same, to corporation to admit alderman to office.</p> <p>2422. Mandamus to compel inspectors of corporate election to give certificate.</p> <p>2423. Notice of motion to quash the alternative writ of mandamus.</p> <p>2424. Return to alternative writ of mandamus.</p> <p>2425. Demurrer to return to alternative writ of mandamus (Wisconsin).</p> <p>2426. Relator's answer to return.</p> | <p>2427. Notice of hearing, on failure of relator to demur or plead.</p> <p>2428. Notice of motion for order settling questions to be tried by jury (Wisconsin).</p> <p>2429. Judgment for damages and awarding peremptory writ after trial.</p> <p>2430. Peremptory writ of mandamus.</p> <p>2431. Petition for alternative writ of mandamus from supreme court in an action <i>publici juris</i> (Wisconsin).</p> <p>2432. Leave by attorney general, to be indorsed on petition.</p> <p>2433. Order of supreme court granting leave.</p> <p>2434. Information in supreme court for writ of mandamus in a case <i>publici juris</i>.</p> <p>2435. Alternative writ of mandamus from supreme court.</p> |
|---|--|

The ancient common-law writs of mandamus and prohibition were high prerogative writs issuing out of the court of King's Bench, the one for the purpose of compelling inferior courts, tribunals or officers to perform some official act within their jurisdiction and the other for the purpose of restraining them from acting outside of or beyond their jurisdiction. Taken in conjunction with the writ of certiorari, they form the principal writs by which the power of superintending control, then vested in the king, was exercised. Certiorari, as a general rule, acted after the rendition of judgment or reaching of a determination by the inferior tribunal, board or officer in order to reverse that judgment or determination, while mandamus and prohibition act pending the proceeding below, either to command the doing of some official act within the jurisdiction or to prevent the doing of some threatened act which is beyond the jurisdiction of the inferior tribunal, board or officer.

The jurisdiction to issue these writs has been generally conferred upon trial courts of general jurisdiction and upon the supreme courts. [See citations to the various statutes in the

headnote to Chapter CLIX *supra*, and Cobb. Ann. Stats. Nebr. sec. 1657 et seq.; Minn. Rev. Laws 1905 secs. 4556 and 4568; Wis. Stats. 1898 sec. 3450 et seq.

Mandamus lies only to compel an inferior court, board or officer to perform a duty imposed by law, when there is no other adequate remedy. The general practice is to issue an alternative writ upon the filing of the petition. To this writ a return is made by the court or officer and this return may be demurred to or answered. The final judgment after trial is either that the peremptory writ issue or do not issue. In case the writ issues damages may be recovered. Wis. Stats. 1898 sec. 3453; N. Dak. Rev. Codes sec. 6120; S. Dak. Rev. Code C. P. sec. 774; Minn. Rev. Laws 1905 sec. 4564.

Sec. 3457 Wis. Stats. 1898 provides that the writ of prohibition shall only be issued out of the supreme court, and a like provision is found in sec. 4568 Minn. Rev. Laws of 1905. This restriction was held ineffectual in Wisconsin, in *State ex rel. v. Pollard*, 112 Wis. 232, because the constitution grants to the circuit court superintending control over inferior courts and jurisdictions, and the legislature had no power to take away the common-law writs necessary for the exercise of that jurisdiction. The constitution of Minnesota makes no such grant of jurisdiction to the district courts.

The ancient writ of *procedendo*, which formerly issued from the Court of Chancery, has fallen into disuse, as its functions are fully performed by the writ of *mandamus*. *State ex rel. v. Johnson*, 103 Wis. 591.

2417. Petition for writ of mandamus, outline form.

To the Court for County.

THE PETITION of C.... D.... of, in the county of, state of, respectfully alleges * [*allege fully the facts showing that the officer to whom the writ is to be directed is charged with the performance of a specific legal duty, that the circumstances have arisen which make it incumbent on the officer to at once discharge the duty, that he refuses to do so and that there is no other adequate and speedy remedy for such refusal*].

WHEREFORE the petitioner prays judgment that a peremptory writ of mandamus issue out of this court commanding the said [*name officer*] to [*state precise duty to be performed*], and for such other judgment or order as may be proper.

G.... H....,

Attorney for Petitioner.

[*Add verification as in case of a pleading.*]

2418. Petition for mandamus against officers of a city, to compel levy of a tax to pay a judgment.

[*Proceed as in last preceding form to the * and continue*]: that the city of is a municipal corporation organized and existing under the laws of the state of and that the defendants are the officers of said corporation authorized by law to levy and collect taxes for and on behalf of said corporation; that on the day of, 19.., the plaintiff recovered a judgment in this court [*or name court*] against said city upon a negotiable bond issued by it for the sum of dollars and costs; that on the day of, 19.., an execution was issued on said judgment and returned wholly unsatisfied, no property of said corporation being found on which to levy the same; that it became the duty of the defendants on or before the day of, 19.., to levy a sufficient tax upon the taxable property of said city to pay the said judgment, with interest and costs; that on the day of, 19.., the plaintiff served upon said defendants a written demand that they levy such tax but that they have wholly neglected and refused to do so; that plaintiff is the owner of the judgment herein referred to, and is greatly damaged and hindered in the collection of said judgment by said neglect and refusal.

WHEREFORE the plaintiff prays that a writ of mandamus issue, commanding said defendants forthwith to levy and collect a sufficient tax to pay the said judgment, with interest and costs, together with the costs of this action, and pay the same to the plaintiff.

[*Add verification as in case of a pleading.*]

2419. Order that alternative writ issue.

STATE OF,
..... Court for County.

State ex rel. C.... D....,	}
Petitioner,	
vs.	
L.... M.... [<i>give title</i>	}
of office],	
Defendant.	

On reading and filing the verified petition of C.... D.... and on motion of G.... H...., attorney for the petitioner, let an alternative writ of mandamus issue out of, and under seal of, this court, to L.... M.... [*give title of office*], commanding him that he [*here specify fully the duty to be performed*], or

that in default thereof he show cause before the circuit court for county, at a term thereof, to be held at the court house, in the city of, in said county, on the.... day of 19.., at the opening of court on said day, or as soon thereafter as counsel can be heard, why he has not done so, by due return to said writ, and let a copy of said petition be served on said L.... M...., with such writ. [Date.]

J.... K....,
Circuit Judge.

2420. Alternative writ of mandamus.

The State of to L.... M.... [*give official title*].

GREETING: Whereas, it appears to this court by the verified petition of C.... D.... on file in the office of the clerk of our said court that [*here recite specifically the facts set forth in the petition showing the existence of the duty*] and nevertheless you have unjustly refused [*state duty or act neglected*] to the injury of the said C.... D.... [*relator*], as appears to us by his said petition.

NOW, THEREFORE, we, being willing that speedy justice should be done in this behalf to him, the said C.... D...., do command and enjoin you that immediately after the receipt of this writ, you [*here state act required*] or that you show cause to the contrary before our court for the county of at a term thereof to be held at the, in, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard. And have you then and there this writ and make due return of your execution of the same.

Witness Hon. J.... K...., judge of our said
[SEAL.] court this day of, 19..
R.... S...., Clerk.

2421. The same, to corporation to admit alderman to office.

[*Address as in last preceding form.*]

GREETING: Whereas, it appears to this court by the verified petition of C.... D...., on file in the office of the clerk of our said court, that said C.... D.... was duly elected one of the aldermen of the ward of the said city, to-wit, on, etc., at, etc., and by the said mayor of the said city in presence of you, the said aldermen and commonalty, ought to be admitted and sworn into the said office of alderman; nevertheless, you, not being ignorant of the premises, but disregarding your duty therein, have not only refused [*though thereto required by the said C.... D....*], to cause the said A.... B.... to be sworn and admitted into the said office of alderman, in manner aforesaid, but yet do

refuse so to do, in contempt of us, and to the great damage of the said C.... D...., as by his said petition we have understood.

WE, THEREFORE, being willing that speedy justice should be done in this behalf, do command and firmly enjoin you, that immediately after the receipt of this writ, you do cause the said C.... D.... to be duly sworn and admitted into the said office of alderman; or that you show cause, etc. [*as in last preceding form*].

2422. Mandamus to compel inspector of corporate election to give certificate.

[*Address and commencement as in last preceding form and continuing with statement of grievance thus*]: That in an election duly held on the day of, 19.., for three trustees to supply the places of three whose offices were about to expire, by the religious corporation existing under the law of this state, for the incorporation of religious societies, under the style of; at which election, you, the said [*defendants*], being members of the said society, and deacons of the said church, having been duly nominated therefor by a majority of the voters present, presided; the said relators were by the greatest number of votes cast duly elected as said trustees, and that you did, then and there, declare that they were so elected, and that the said election was adjourned without any voter challenging or questioning the election of the said relators; and that you now refuse to give to the said relators the proper certificate of their election, provided for by the law aforesaid.

WE, THEREFORE, being willing that speedy justice should be done in this behalf, do hereby command and enjoin you forthwith to make, execute, and deliver under your hands and seals, to the said relators, a certificate of their election as aforesaid, in due form of law, or show cause, etc. [*as in last preceding form*].

2423. Notice of motion to quash the alternative writ of mandamus.

[*Title.*]

TAKE NOTICE that L.... M...., the defendant above named, will move the court at a term thereof, to be held at the court house, in the city of, in said county, on the day of, 19.., at the opening of court on that day, or as soon thereafter as counsel can be heard, to quash the alternative writ of mandamus issued herein, for the reason that neither the petition herein nor said alternative writ states facts showing

that the said C.... D.... is entitled to a writ of mandamus as prayed.

[Date.]

E.... F....,

Attorney for Defendant.

To G.... H...., Esq.,

Attorney for Petitioner.

2424. Return to alternative writ of mandamus.

[Title.]

I, L.... M.... [*title of office*], do hereby make return to the alternative writ of mandamus hereto annexed, and for cause why I have not, and cannot lawfully do the things therein commanded, I respectfully represent and show to this honorable court:

That [*here set forth the facts constituting the defense as in a pleading*].

All of which is respectfully submitted.

L.... M....,

E.... F....,

[*Official title.*]

Attorney for Defendant.

[*Add verification as in case of a pleading.*]

2425. Demurrer to return to alternative writ of mandamus
(Wis. Stats. 1898 sec. 3451).

[Title.]

The relator herein demurs to the return of L.... M.... to the alternative writ of mandamus issued in this cause, on the ground that it appears upon the face thereof that the same does not state facts sufficient to constitute a defense, nor show any cause for not obeying said writ.

G.... H....,

Attorney for Relator.

2426. Relator's answer to return.

[Title.]

The above named relator, by G.... H...., his attorney, answering the return of L.... M...., defendant, to the alternative of mandamus herein:

Denies that [*deny such allegations as it is desired to put in issue*].

And further answering said return the relator alleges [*allege any new matter by way of avoidance of the facts stated in the return*].

G.... H....,

Attorney for Relator.

[*Add verification as in case of a pleading.*]

2427. Notice of hearing, on failure of relator to demur or plead.

[Title.]

TAKE NOTICE, that the above cause will be brought to a hearing on the return to the writ of mandamus herein, at a term of this court, to be held at the court house in on the day of, instant, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

[Date.]

E.... F....,

Attorney for Defendant.

To G.... H...., Esq.,

Attorney for Relator.

2428. Notice of motion for order settling questions to be tried by jury (Wis. C. C. Rule XXX).

[Title.]

TAKE NOTICE that the relator [*or*, defendant] upon the petition, alternative writ, return and answer herein will move the court at a term thereof, to be held at the court house, in the city of, in said county, on the day of, 19... , for an order prescribing what questions shall be tried by the jury in this cause.

[Date.]

G.... H....,

Attorney for Relator [*or*, Defendant].

To L.... M....,

Attorney for

2429. Judgment for damages and awarding peremptory writ after trial.

[Title.]

[Caption as in Form 7.]

This action having come on for trial upon the petition of the relator herein, the return of the defendant and the answer of said relator thereto, and having been tried by the court [jury trial having been waived] and the court having filed its findings of facts herein [*or*, and the court having ordered certain questions of fact herein to be tried by a jury, and the same having been duly tried and a verdict rendered which is on file herein as follows, [*recite verdict*], and the court having determined as conclusions of law that the relator is entitled to a peremptory writ of mandamus, as prayed in the petition, and to the recovery of damages as hereinafter adjudged,

Now, upon motion of G.... H...., Esq., attorney for said relator,

IT IS ADJUDGED that the said C.... D...., do have and recover of the said L.... M...., defendant, the sum of dollars, his damages, as found by the court [*or* jury], and the further sum of dollars, taxed as the costs of

this action, amounting in all to the sum of dollars, and that the relator have execution therefor.

And it is further adjudged that the petitioner have a peremptory writ of mandamus, and that the same do issue forthwith, directed to and commanding the said defendant L.... M.... [*title of office*], upon the pain and peril that shall fall thereon for refusal, that he [*here specify act to be done*].

By the Court:

R.... S...., Clerk.

2430. Peremptory writ of mandamus.

[*Title.*]

The state of to L.... M.... [*give official title*].

GREETING: Whereas upon trial of the issues in the above entitled action this court has duly found and adjudged that [*here recite the facts found showing the defendant's duty to act*];

Nevertheless you have unjustly refused and still do refuse to [*specify act refused to be done*] to the manifest injury of the said relator, as we have found and adjudged;

NOW, THEREFORE, we, being willing that speedy justice should be done in this behalf to him, the said C.... D...., do command and enjoin you that immediately after receipt of this writ you [*here specify act required*]; and we do also command that you make known to us before our court in and for the county of at, on the day of, 19.., how you shall have executed this writ; and have you then and there this writ.

Witness, etc. [*as in Form 2420*].

2431. Petition for alternative writ of mandamus from supreme court in an action publici juris (Wisconsin).¹

To the Honorable the Justices of the Supreme Court of the State of

THE PETITION of C.... D.... respectfully shows to the

¹ In Wisconsin the supreme court will exercise its original jurisdiction by mandamus only in cases *publici juris* affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people, and leave must first be obtained from the court itself upon a *prima facie* showing. *Atty. General v. R. R. Cos.*, 35 Wis. 521; *Atty. Gen. v. Eau Claire*, 37 Wis. 400. In such case the attorney general should first be applied

to upon sworn relation, and if he consent application is then made to the court and, if leave be granted, the action is brought on the information of the attorney general based upon the relation; if the attorney general refuse his consent the court may nevertheless authorize the action to be brought upon the relation. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90.

court and alleges [*here state fully the facts showing the duty and refusal to perform it as in a pleading*];

WHEREFORE your petitioners pray that an alternative writ of mandamus issue out of and under the seal of this court, directed to the said L.... M.... [*give official title*], commanding him to [*state act desired*], and that until the further order of this court all proceedings on the part of the said L.... M.... in said matter be stayed.

C.... D....,
Petitioner.

G.... H....,
Attorney.

[*Add verification as in case of a pleading.*]

2432. Leave by attorney general, to be indorsed on petition.

It appearing to me by the within petition that due cause exists, I do hereby grant leave to file the said petition in the supreme court, and to file an information in said court in my name as attorney general of the state of Wisconsin upon leave being granted by said court.

[*Date.*]

M.... N....,
Attorney General, etc.

2433. Order of supreme court granting leave.

[*Title.*]

[*Caption as in Form 7.*]

On reading and filing the petition of C.... D.... and the consent of M.... N...., attorney general of the state of, indorsed thereon [*or in case the attorney general refuses leave say*, and it appearing that the attorney general refuses leave to prosecute this action in his name, but that the case is a proper one for the exercise of the original jurisdiction of this court by mandamus] and on motion of G.... H...., Esq.,

IT IS ORDERED that the said attorney general [*or that G.... H...., Esq., in the name of the attorney general*] have leave to file said petition and an information in this court against L.... M.... [*name officer*] to compel him the said L.... M.... by mandamus to [*specify act*].

By the Court:

R.... S...., Clerk.

2434. Information in supreme court for writ of mandamus in a case publici juris.

[*Title.*]

NOW COMES M.... N...., attorney general of the state of, suing for and on behalf of the state, upon leave had and obtained [*or: Now comes G.... H.... in the name of the*

attorney general of the state of Wisconsin, on behalf of the state, upon leave had and obtained] and upon the relation of C.... D.... and gives the said supreme court to understand and be informed that [*here state facts as in the relation*].

WHEREFORE the said attorney general [*or the said G.... H.... on behalf of the said attorney general*] prays, etc. [*as in Form 2431*].

M.... N....,
Attorney General.

G.... H....,
Attorney for Relator.

2435. Alternative writ of mandamus from supreme court.

The State of Wisconsin to L.... M.... [*give official title*].

GREETING: Whereas it appears to our said court by the relation of C.... D.... and the information based thereon filed by the attorney general [*or by G.... H...., Esq., on behalf of the attorney general*], by leave of this court, that [*here recite facts set forth in the information*];

NOW, THEREFORE, we being willing that speedy justice, etc. [*follow substantially Form 2420*].

[*If a stay of proceedings be necessary it may be ordered in the writ.*]

[*The forms for motion to quash the writ, return, demurrer and answer heretofore given in this chapter for use in trial courts may be adapted for use in supreme court, as well as the forms for judgment and peremptory writ.*]

CHAPTER CLXI.

PROHIBITION.

- | | |
|---|--|
| 2436. Petition for writ of prohibition against court acting without jurisdiction. | 2438. Return to alternative writ of prohibition. |
| 2437. Alternative writ of prohibition to inferior court. | 2439. Writ of prohibition absolute. |

For a brief statement of the functions of this writ see head-note to last preceding chapter on mandamus.

2436. Petition for writ of prohibition against court acting without jurisdiction.¹

To the Court of the County of

THE PETITION of C.... D.... of in said county, respectfully alleges:

I. That, on or about the day of, 19.., he was summoned [a copy of which summons is hereto annexed] to appear in the court of, on the day of, 19.., before [*describing with precision the tribunal*], to answer [*here set forth the nature of the proceeding*].

II. That, in pursuance of said summons, your petitioner did attend at the said court, and did then and there object to the jurisdiction of the said court to entertain said action [*here set forth the ground of objection, and the facts showing lack of jurisdiction, which the applicant offered to prove in support of it*].

III. That the said judge, notwithstanding the said objection [and notwithstanding the said offer of the petitioner to prove, etc.], did proceed to hear the said cause, and refused to dismiss the same and decided that he had jurisdiction thereof and set the same down for trial on the day of, 19.., and will, as petitioner is informed and verily believes, then proceed

¹ The petition for a writ of prohibition should follow the general form of a petition for writ of mandamus; the cases in which it may be used vary so greatly that forms are of little use. It should set forth clearly the facts which show

that the officer to whom it is to be addressed is acting and threatening to act outside of his jurisdiction to the damage of the petitioner and that the petitioner has no other speedy and adequate remedy.

essary; if the writ be also directed to the opposing party in an action he should adopt the return of the court or judge as follows]:

The foregoing return is hereby adopted by the undersigned A.... B...., named in the writ of prohibition hereto annexed, and will be relied upon as a sufficient cause why said writ of prohibition should not be made absolute herein.

[Date.]

A.... B....

[The subsequent proceedings may be adapted from the forms for mandamus given in the last preceding chapter.]

2439. Writ of prohibition absolute.

[Proceed as in Form 2437 to the * and continue]: and having tried the issues arising in said action and having adjudged [state substance of judgment], do command you that you absolutely refrain from any further proceedings in the said action [or name particular act to be refrained from].

Hereof fail not at your peril.

Witness, etc. [conclude as in Form 2420].

CHAPTER CLXII.

QUO WARRANTO IN SUPREME COURT.

- | | |
|--|---|
| <p>2440. Application by attorney general for leave to file information in <i>quo warranto</i>.</p> <p>2441. Order granting leave on last preceding application.</p> <p>2442. Order to show cause why leave should not be granted.</p> <p>2443. Relation in <i>quo warranto</i>.</p> <p>2444. Information by attorney general in <i>quo warranto</i>.</p> | <p>2445. Order of arrest in <i>quo warranto</i> (Wisconsin).</p> <p>2446. Motion to quash <i>quo warranto</i> proceedings.</p> <p>2447. Defendant's plea to the information.</p> <p>2448. Demurrer to defendant's plea.</p> <p>2449. Replication to defendant's plea.</p> |
|--|---|

The forms given in this chapter are intended for use in the supreme court of Wisconsin under Wis. Stats. 1898 chap. 149. For a brief discussion of the subject of the ancient writ of *quo warranto* and the statutory remedies which have been substituted therefor, see headnote to Chapter LXXX of this work.

2440. Application by attorney general for leave to file information in *quo warranto*.

[*Venue.*]

To the Supreme Court of the State of Wisconsin.

Now comes M.... N...., attorney general of said state, upon relation of C.... D...., herewith submitted, the allegations of which relation can be established by evidence, as he is informed and believes, and makes application that this court exercise its original jurisdiction in said matter and that he be granted leave to file an information in this court in the nature of *quo warranto* for the purpose of [*here briefly state purpose*].

M.... N....,
Attorney General.

2441. Order granting leave on last preceding application.

[*Title.*]

On reading and filing the application of M.... N...., attorney general of said state, and the relation of C.... D.... submitted therewith; it appearing that sufficient cause exists therefor,

IT IS ORDERED that said attorney general have leave to file an information upon said relation in this court in the nature of a *quo warranto* against the said A.... B...., and that upon

the filing thereof a writ issue out of this court directed to the said A.... B.... and commanding him to appear before this court at, on the day of, 19.., then and there to show by what warrant or authority he holds or claims to hold and exercise the office of which he is alleged to have usurped, and to abide by the judgment of the court which may be entered in the premises.

Witness, etc. [*as in Form 2420*].

2442. Order to show cause why leave should not be granted.

[*Title.*]

On reading and filing the application of M.... N...., attorney general for the state of Wisconsin, for leave to file an information in the nature of *quo warranto* against A.... B...., upon the relation of C.... D...., submitted therewith,

LET the said A.... B.... show cause before this court, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, why such leave should not be granted.

And let a copy of this order and of the said relation be served on the said A.... B.... at least days before the time fixed for showing cause as aforesaid.

[*Date.*]

J.... K....,
Chief Justice.

2443. Relation in quo warranto.

[*Title.*]

To the Hon. M.... N...., Attorney General of said state, and to the Justices of the Supreme Court thereof.

THE RELATION and petition of C.... D.... of respectfully shows and alleges, that one A.... B.... of has for the space of months last past held and exercised and still does hold and exercise the office of without legal election, appointment or authority therefor.

That at an election duly called and held [*here state the facts showing the due election of the relator substantially as in Form 1265*].

That on the day of, 19.., the said A.... B.... usurped and intruded himself into said office and has ever since continued to unlawfully exercise the same and withhold the same and still does withhold the same together with the fees and emoluments thereof from this relator to his great damage and to the damage and prejudice of the state and its people.

WHEREFORE relator prays that an information in the nature of *quo warranto* may be filed in this court in this relation against said A.... B.... and that such proceedings be had

thereon as are provided by law and that said defendant be ousted from the exercise of said office and for such other relief as may be in accordance with law. C.... D....

[*Add verification as in case of a pleading.*]

2444. Information by attorney general in quo warranto.

[*Title.*]

[*Venue.*]

AND NOW COMES M.... N...., attorney general of the state of Wisconsin, on behalf of the state and upon the relation of C.... D...., heretofore filed, and gives the said supreme court to understand and be informed leave to file said information having been duly granted:

That [*here state facts substantially as in the relation*].

WHEREFORE the said attorney general prays the advice of this court in the premises, and that this court issue its process against the said defendant requiring him to answer by what authority he claims to hold and exercise the said office, and to receive and keep the fees and emoluments thereof, and that such other proceedings may be had in the premises as provided by law.

M.... N....,
Attorney General.

2445. Order of arrest in quo warranto (Wis. Stats. 1898 sec. 3467).

[*Title.*]

The State of Wisconsin to the Sheriff of County.

GREETING: Whereas upon leave duly granted an information has been filed in our said court by the attorney general of said state, upon relation of C.... D...., from which information and relation it appears that A.... B...., the defendant, has usurped the office of, and that the relator is rightfully entitled thereto and that the said defendant has received fees and emoluments belonging to the said office and by means of his usurpation thereof,

YOU ARE HEREBY ordered and required forthwith to arrest the defendant A.... B...., and hold him to bail in the sum of dollars, and to return this order to the attorney general, by whom this order is subscribed, at his office in the capitol at Madison in Dane county, on the day of, 19..

Dated at Madison, this day of, 19..

M.... N....,

Attorney General.

J.... K....,
Chief Justice.

[*The bail bond may be substantially as in the case of civil arrest. See Forms 189 and 191.*]

2446. Motion to quash quo warranto proceedings.

[Title.]

AND NOW COMES the said defendant, A.... B...., by E.... F...., his attorney, and moves to quash the writ issued herein and all proceedings upon the information filed herein for the reason [*state reasons according to the nature of the case*].

E.... F....,

Attorney for Defendant.

2447. Defendant's plea to the information.

[Title.]

NOW COMES the said defendant, A.... B...., and for a plea to the information filed herein alleges that said information ought not to be sustained, because he says [*here state facts constituting defense as in a pleading*], all of which the said defendant is ready to verify.

A.... B....,

E.... F....,

Defendant above named.

Attorney for Defendant.

2448. Demurrer to defendant's plea.

[Title.]

NOW COMES the attorney general of said state and demurs to the said defendant's plea to the information herein, and says that said plea is not sufficient in law to bar the state from having and maintaining its said information against the said A.... B.... or to excuse the said A.... B.... from the usurpation and unlawful exercise of office charged in said information, and that said attorney general is not bound to answer said plea, all of which he, the said attorney general, is ready to verify.

WHEREFORE said attorney general prays judgment that said defendant be excluded from said office of

M.... N....,

Attorney General.

2449. Replication to defendant's plea.

[Title.]

AND NOW COMES the attorney general of said state and says that by reason of any thing alleged in the plea of said defendant the state ought not to be precluded from having and maintaining the said information, because he says [*here state facts by way of denial or confession and avoidance relied on*].

And this the said attorney general prays may be inquired of by the country [*or, if new matter is pleaded*]: And this the defendant is ready to verify.

WHEREFORE, he prays judgment [*as in information*].

M.... N....,

Attorney General.

PART VIII.



MISCELLANEOUS FORMS.

CHAPTER CLXIII.

FORECLOSURE OF MORTGAGES BY ADVERTISEMENT.

- | | |
|--|--|
| <p>2450. Notice of sale in foreclosure by advertisement.</p> <p>2451. Affidavit of publication of foregoing notice.</p> <p>2452. Affidavit by auctioneer or officer of the fact of sale.</p> <p>2453. Sheriff's certificate of sale.</p> <p>2454. Sheriff's deed, on foreclosure by advertisement.</p> <p>2455. Notice of chattel mortgage sale.</p> | <p>2456. Affidavit of service of notice on mortgagor (Minnesota).</p> <p>2457. Affidavit that mortgagor could not be found.</p> <p>2458. Affidavit of service of notice on party in possession of mortgaged property.</p> <p>2459. Affidavit of posting.</p> <p>2460. Report of chattel mortgage sale (Minnesota).</p> |
|--|--|

Real estate mortgages containing a power of sale may be foreclosed without action by advertisement in some of the states. Wis. Stats. 1898 sec. 3523 et seq.; Minn. Rev. Laws 1905 sec. 4457 et seq.; N. Dak. Rev. Codes sec. 5844 et seq.; S. Dak. Rev. Codes C. P. sec. 636 et seq. The legal provisions in the states named are substantially similar. In Iowa it is provided that no deed of trust or mortgage of real estate shall be foreclosed in any other manner than by action in equity. Iowa Code sec. 4287.

In the following states foreclosure by advertisement of a chattel mortgage containing a power of sale is regulated by statute. Minn. Rev. Laws 1905 sec. 3468 et seq.; Iowa Code sec. 4273 et seq.; N. Dak. Rev. Codes sec. 5883 et seq.; S. Dak. Rev. Codes C. P. sec. 2074 et seq.; Cobbe's Ann. Stats. Nebr. sec. 3900 et seq.

2450. Notice of sale in foreclosure by advertisement.

NOTICE is hereby given that that certain mortgage executed and delivered by A.... B...., mortgagor, to C.... D...., mortgagee, dated the day of, 19.., and filed for record in the office of the register of deeds of the county of and state of on the day of, 19.., and recorded in book of mortgages at page [and assigned by said mortgagee to E.... F....] will be foreclosed

¹ This is the form prescribed by sec. 5849 Rev. Codes of North Dakota and with slight changes will meet the requirements of other

states. In Wisconsin the amount claimed to be due at the date of the notice must be stated. Wis. Stats. 1898 sec. 3527.

by a sale of the premises described in such mortgage and hereinafter described, at the front door of the court house in the city of in the county of and state of at the hour of o'clock .. M on the day of, 19.., to satisfy the amount due upon such mortgage on the day of sale. The premises described in such mortgage and which will be sold to satisfy the same are described as follows [*insert description as in mortgage*].

There will be due on such mortgage at the date of sale the sum of dollars.

[*Date.*]

C.... D...., Mortgagee.

or

E.... F...., Assignee of said mortgage.

2451. Affidavit of publication of foregoing notice. -

[*Venue.*]

M.... N...., being duly sworn, deposes and says that he is, and during the time of the publication of the notice hereinafter mentioned was the printer of the N.... Z.... which is a newspaper of general circulation published in the city of and county of and state of; that the notice of mortgage foreclosure and sale, of which a printed copy, taken from said newspaper, is hereto annexed, has been published in said newspaper once in each week for six successive weeks, prior to the time specified in said notice of sale of said premises, which publication commenced on the day of, 19.., and ended on the day of, 19..

[*Jurat.*]

M.... N....

[*Attach copy of notice as printed.*]

2452. Affidavit by auctioneer or officer of the fact of sale.²

[*Venue.*]

L.... M.... of, county of and state of, being duly sworn says [that at the time of the mortgage foreclosure hereinafter mentioned, he was the sheriff *or* deputy sheriff of the county of, state of, and] that he is the person who acted as auctioneer at the sale of the premises

² In Wisconsin the sale may be conducted by the person appointed for that purpose in the mortgage, or by the sheriff. Wis. Stats. 1898 sec. 3528. In Minnesota, North Dakota and South Dakota the sale must be made by the sheriff or deputy sheriff. Minn. Rev. Laws

1905 sec. 4462; N. Dak. Rev. Codes sec. 5850; S. Dak. Rev. Codes C. P. sec. 641. This affidavit is required to perpetuate evidence of the sales in Wisconsin (Wis. Stats. 1898 sec. 3536), and in South Dakota (S. Dak. Rev. Codes C. P. sec. 650).

described in the annexed printed copy of the notice of sale, by virtue of the mortgage therein mentioned and pursuant to said notice, and that this deponent, as such [sheriff or deputy sheriff and] auctioneer, did at the time and place mentioned in said notice of such sale, to-wit, on the day of, 19.., at o'clock in the noon of that day, at the [name place] in the said county of, state of Wisconsin, by virtue of the power of sale contained in said mortgage, and pursuant to said notice of sale, duly sell at public auction the lands and premises, a description of which is contained in said mortgage, and set forth in said notice, to-wit [describe premises] unto X.... Y.... for the sum of dollars, he being the highest and best bidder therefor, and that being the highest sum bidden for the same.

Deponent further says that the said sale was made between nine o'clock in the forenoon and the setting of the sun of said day and was fairly and legally conducted; that the mortgaged premises, so far as they consisted of distinct farms, tracts, or lots, were sold separately, and that no more tracts, farms or lots were sold than were necessary to satisfy the amount due on said mortgage at the date of said notice of sale, with interest and the costs and expenses allowed by law.

Deponent further says that he paid out and applied said moneys as follows:

Principal and interest of mortgage at date of sale \$.....

Stipulated attorney's fees..... \$.....

Printer's fees \$.....

Sheriff's fees \$.....

and that he paid the surplus, to-wit, ... dollars to the said mortgagor.

L.... M....

[Jurat.]

2453. Sheriff's certificate of sale.

[Venue.]

I, L.... M...., sheriff of the county of, state of, do hereby certify, that pursuant to the terms of that certain mortgage, dated on the day of, 19.., executed by A.... B...., mortgagor, to C.... D...., mortgagee, and duly recorded in the office of the register of deeds of said county of, wherein said mortgaged premises are situated, on the day of, 19.., at o'clock in the noon, in volume of mortgages, on page, and pursuant to the notice of sale on foreclosure of said mortgage by

advertisement, which notice was duly given and published for the time and in the manner prescribed by statute [a printed copy of which notice is hereto annexed and made a part of this certificate], and by virtue of the power of sale contained in said mortgage and of the statute in such case made and provided, I did, as such sheriff, at the time and place mentioned in such notice of sale, to-wit, on the day of, 19.., at o'clock in the noon, at [*name place*] in the city of in said county, duly offer for sale, and did then and there duly sell at public vendue the mortgaged premises situate, in said county, ..., and described in said mortgage as follows, to-wit [*describe premises*] unto X.... Y...., of, at and for the sum of dollars, he being the highest bidder and that being the highest sum bidden at said sale. I further certify that said premises are subject to redemption at any time within one year from and after said sale, as provided by law, and that said purchaser will be entitled to a deed for said premises at the expiration of one year from and after the day of, 19.., unless they shall be redeemed as provided by law.

L.... M.... [Seal.]

Signed, sealed and delivered in
presence of [*two witnesses*.]
[*Venue*.]

Sheriff of said County.

Be it remembered, that on this day of, 19.., before me personally came L.... M...., to me known to be the person of that name mentioned and described in, and who executed the foregoing certificate of sale, and to me known to be the sheriff of the county of, state of, and acknowledged that he executed the same as such sheriff freely and voluntarily for the uses and purposes therein named.

O.... P....,

[SEAL.]

Notary Public,
..... County.

2454. Sheriff's deed, on foreclosure by advertisement.^s

THIS INDENTURE, made this day of, 19.., between L.... M...., sheriff of county, state of, party of the first part, and X.... Y...., of, party of the second part.

WITNESSETH, that whereas, on or about the day of, 19.., pursuant to the provisions in that certain mort-

^s For forms in case of redemption from sale, see forms given in case of foreclosure by action in chapter CXLV

gage, bearing date the day of, 19.., executed and delivered by A.... B...., mortgagor, to C.... D...., mortgagee, and duly recorded in the office of the register of deeds of the county of in the state of, wherein said mortgaged premises are situated, on the day of, 19.., at o'clock in the noon of said day, in volume of mortgages, on page; and by virtue of the power of sale contained in said mortgage and of the statute in such case provided, and pursuant to the notice of sale on foreclosure by advertisement duly given and published for the time and in the manner prescribed by statute, I, L.... M...., of, county of and state of, did, as such sheriff and auctioneer, at the time and place mentioned in said notice of sale, to-wit, on the day of, 19.., at o'clock in the noon, of that day, at [*name place*] in the city of, county of and state of, duly offer for sale, and did then and there duly sell at public auction the mortgaged premises described in said mortgage, and hereinafter described situate, lying and being in the county of state of, unto X.... Y...., aforesaid, at and for the sum of dollars, he being the highest and best bidder therefor, and that being the highest sum bid for the same.

And whereas, upon the said sale I did make out and subscribe duplicate certificates of sale, setting forth a particular description of the premises sold, the price bid for the same, the whole consideration money paid, and the time when such sale would become absolute and the purchaser at such sale would be entitled to a deed for the same, unless redeemed as provided by law, one of which duplicate certificates was, within ten days after the sale of such lands, filed in the office of the register of deeds of said county of, as appears from said certificate now on file, and the other was delivered to the said purchaser.

And whereas, the said premises, after the expiration of one year from and after the time of said sale, remain unredeemed, and no creditor of said A.... B.... has acquired the right or title of said purchaser:

NOW, THEREFORE, know ye, that I, the said L.... M...., the sheriff, and auctioneer by whom the said sale was made, by virtue of the power of sale in said mortgage contained and of the statute in such case made and provided, and in consideration of the said sum of dollars, to me in hand paid by the said X.... Y...., the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened and conveyed, and by these presents do grant, bargain, sell, alien and convey

unto the said X.... Y.... and to his heirs and assigns forever, all the following real estate with the appurtenances, situate, lying and being in the county of and state of, known and described as [*insert usual description*].

TO HAVE and to hold all and singular the premises above mentioned and described, and every part thereof, with the appurtenances above mentioned and described, and hereby conveyed, or intended so to be, unto the said X.... Y...., party of the second part, his heirs and assigns forever to his and their only proper use and behoof.

IN WITNESS whereof I, L.... M...., sheriff, and auctioneer as aforesaid, have hereunto set my hand and seal the day and year first above mentioned.

Signed, sealed and delivered in presence of [*two witnesses*.]
[*Venue*.]

L.... M...., [Seal.]

Sheriff County,
State of

Be it remembered, that on this day of, 19..., before me personally came L.... M...., to me known to be the person of that name mentioned and described in, and who executed the foregoing conveyance, and to me known to be the sheriff of county, state of, and acknowledged that he executed the same as such sheriff freely and voluntarily for the uses and purposes therein named.

[SEAL.]

O.... P....,
Notary Public, ... County,
State of

2455. Notice of chattel mortgage sale.

NOTICE is hereby given, that, whereas default has occurred in the conditions of that certain chattel mortgage executed by A.... B...., mortgagor, to C.... D...., mortgagee [and thereafter assigned to E.... F....], bearing date on the day of, 19..., by reason of the failure of said mortgagor to pay the debt secured thereby [*or otherwise state the default according to the fact*], and whereas there is now due and unpaid on said indebtedness to the undersigned the sum of dollars;

Now, therefore, the property described in said mortgage, to-wit [*describe property*], or so much thereof as may be necessary, will be sold pursuant to the power of sale in said mortgage contained, at public sale, to the highest bidder for cash, on, the day of, 19..., at o'clock in the noon of said day, at [*name place*] in the city of, county of and state of, to satisfy the debt secured by said

mortgage, and the costs and expenses of these foreclosure proceedings.

Dated at, this day of, 19..

or E.... F...., Assignee of said Mortgagee.

C.... D...., Mortgagee.

G.... H...., Agent or Attorney

for C.... D...., Mortgagee.

[In Nebraska this notice must contain also a statement of the place where the mortgage is recorded.]

2456. Affidavit of service of notice on mortgagor (Minn. Rev. Laws 1905 sec. 3469).

[*Venue.*]

L.... M...., being duly sworn, says that on the day of, 19.., at, in said county, he served the annexed notice [*or within notice*] of chattel mortgage sale upon the mortgagor, A.... B...., named therein, by then and there [*state manner of service as in case of a summons*].

L.... M....

[*Jurat.*]

[If the mortgagor was in possession of the mortgaged property state the fact in the above affidavit.]

2457. Affidavit that mortgagor could not be found.

[*Venue.*]

L.... M...., being duly sworn, says that on the day of, 19.., he made diligent search for A.... B...., the mortgagor named in the foregoing and annexed notice of sale, within said county of, state of, and that he was unable to find said mortgagor within said county; and affiant further states that to the best of his knowledge and belief the said mortgagor was not then in, and that he could not then be found in said county.

L.... M....

[*Jurat.*]

2458. Affidavit of service of notice on party in possession of mortgaged property.

[*Venue.*]

L.... M.... being duly sworn, says that on the day of, 19.., one Q.... R.... of the city of, county of, and state of, had in his possession the mortgaged property described in the annexed [*or within*] notice of sale; and affiant further says that on said date at, in said

county, he served said notice of sale upon the said Q.... R.... by then and there [*state manner of service as in case of a summons*].

[*Jurat.*]

L.... M....

2459. Affidavit of posting.

[*Venue.*]

L.... M...., being first duly sworn, says that on the day of, 19.., he duly posted three true and correct copies of the foregoing [*or annexed*] notice of sale at three public places in the said county of as follows:

One at

One at

One at

[*Jurat.*]

L.... M....

2460. Report of chattel mortgage sale (Minn. Rev. Laws 1905-sec. 3470).

[*Venue.*]

I, L.... M.... [sheriff of the said county of], do hereby certify and report that pursuant to the annexed notice of sale, and the mortgage therein described, I did, at the time and place designated in said notice, expose for sale at public-vendue, to the highest bidder, the property described in said mortgage and notice, and then and there sold the same as follows:

[*Name article*] to [*name purchaser*] for the sum of dollars.

[*Proceed in the same way with all the articles sold.*]

And I do further certify and report that said bidders were respectively the highest and best bidders, and the said sums so bid by them respectively were the highest and best sums bid at said sale, and that the said sale was fairly conducted and all of said property present and in view at the time thereof.

That the necessary expenses of seizure, keeping and sale of said property were as follows:

[*Give itemized statement thereof.*]

That I first paid all of said expenses, to-wit, the sum of dollars, and applied the remainder of the amount received, to-wit, the sum of dollars, upon the said chattel mortgage [and returned the following property, not sold, to A.... B...., the mortgagor, *describe same*].

[*Date.*]

L.... M....

[*If sale was made by one not an officer attach the following affidavit*]:

[*Venue.*]

L.... M...., being duly sworn, says that he is the person who conducted the sale referred to in the foregoing report, and that said report signed by him is just and correct, and that the same is a complete and correct report and return of all the proceedings had in said foreclosure.

L.... M....

[*Jurat.*]

2460a. Affidavit of attorney.

[*Venue.*]

E.... F...., being first duly sworn, says that he is a regularly admitted attorney at law in the state of, residing at, county of in said state, and that he foreclosed the mortgage described in the annexed notice of sale as attorney for C.... D...., the mortgagee therein mentioned, and that he has been paid the sum of dollars as attorney's fee for such service.

E.... F....

[*Jurat.*]

[*Attach all affidavits to the report.*]

CHAPTER CLXIV.

VARIOUS LEGAL PROCEEDINGS NOT CLASSIFIED.

- | | |
|---|--|
| 2461. Petition to circuit court for allowance of appeal from county court after expiration of time (Wisconsin). | enforce log lien (Wisconsin). |
| 2462. Order allowing appeal on foregoing petition. | 2479. Writ of attachment to enforce log lien. |
| 2463. Petition to set off mutual judgments. | 2480. Affidavit of intervenor who seeks to defend log lien action (Wisconsin). |
| 2464. Order setting off judgments. | 2481. Undertaking by intervenor after judgment to stay execution in log lien action (Wisconsin). |
| 2465. Order appointing receiver in a creditor's action (Wisconsin). | 2482. Petition for change of name (Wisconsin). |
| 2466. Assignment by debtor to receiver. | 2483. Notice of application to change name (Wisconsin). |
| 2467. Petition by receiver to be substituted as a party to a pending action. | 2484. Order changing name (Wisconsin). |
| 2468. Order requiring sheriff to take property and deliver same to receiver (Wisconsin). | 2485. Petition to establish heirship (Wisconsin). |
| 2469. Account of receiver, outline form. | 2486. Affidavit to obtain stay of proceedings until another action is determined. |
| 2470. Affidavit by wife as plaintiff in divorce action, for suit money, temporary alimony, etc. | 2487. Order staying proceedings on foregoing affidavit. |
| 2471. Order to show cause on foregoing affidavit. | 2488. Order staying proceedings until the costs of former action have been paid. |
| 2472. Affidavit of wife, as defendant in divorce action, for suit money, etc. | 2489. Cross-complaint by defendant, outline form (Wisconsin). |
| 2473. Order for suit money, temporary alimony, etc. | 2490. Order bringing in new parties on filing of cross-complaint (Wisconsin). |
| 2474. Petition for removal of action to United States circuit court on ground of diverse citizenship. | 2491. Petition to amend judgment to accord with the findings or decision. |
| 2475. Bond accompanying foregoing petition. | 2492. Order amending mistake in judgment. |
| 2476. Order of removal from state court to United States court. | 2493. Order amending order without prejudice to proceedings already had. |
| 2477. Complaint in action to enforce log lien (Wisconsin). | 2494. Affidavit for receiver in foreclosure action. |
| 2478. Affidavit for attachment to | 2495. Order to show cause in foreclosure why receiver should not be appointed. |
| | 2496. Order appointing receiver in foreclosure. |

2461. Petition to circuit court for allowance of appeal from county court after expiration of time (Wis. Stats. 1898 sec. 4035).

[*Venue.*]

To the Circuit Court of the County of

THE PETITION of C.... D.... of respectfully shows and alleges:

That on the day of, 19..., in the county court of said county, an order was made [*or, judgment entered*] by said court in the matter of the last will and testament of, etc. [*give title*] by which it was ordered [*or, adjudged*] [*state substance of the order or judgment*].

That your petitioner has a direct interest in the matter concerning which said order [*or, judgment*] was entered, in this, that he is one of the legatees named in the will of said [*here state facts showing the interest and that it will be directly affected*].

That, as your petitioner is advised and verily believes, justice requires a revision of the case for the following reasons [*here state the facts and reasons showing that injustice will be done the petitioner if the order or judgment stands and that the same is erroneous*].

That without fault on his part, the appellant omitted to take his appeal from said order [*or, judgment*] within the time required by and according to law; and that such omission was caused by the following facts [*here state the facts, such as sickness or other cause*].

YOUR PETITIONER therefore prays that he be allowed to appeal from said order [*or, judgment*] pursuant to the provisions of the statute in such case made and provided upon such terms and within such time as the court shall deem reasonable.

C.... D....

[*Add verification.*]

[*The petition may be brought to hearing by notice of motion or order to show cause.*]

2462. Order allowing appeal on foregoing petition.

[*Title of court.*]

In the matter of the application of C.... D.... for leave to appeal from an order [<i>or, judgment</i>] of the county court of county.	}
--	---

This matter coming on to be heard at the term of the circuit court for county on the day of,

19.., upon the petition of C.... D.... praying the allowance of an appeal to this court from the order [*or, judgment*] of the county court of county, described in said petition; after hearing G.... H...., Esq., for the petitioner and after considering the affidavits of N.... O.... and O.... P...., filed by E.... F...., Esq., who appeared in opposition to said motion; and it satisfactorily appearing that the said C.... D.... omitted to appeal from said order [*or, judgment*] without fault on his part and that justice requires a revision of the case;

Now, on motion of G.... H...., of counsel for said petitioner,

IT IS ORDERED, that said petitioner be allowed to take an appeal from the order [*or, judgment*] described in said petition, within days from the date hereof, and that notice of said appeal be filed with the county court in like manner as appeals are taken, when done seasonably.

That before such appeal shall be effectual, the appellant shall also file with the county court an undertaking in such sum and with such surety as the judge of said county court shall approve, to the effect required by section 4032, of the Wisconsin Statutes of 1898, and that he give notice of such appeal to such persons and in the manner which the county court shall order [*or specify such other terms as are required in the particular case*].

[*Date.*]

By the Court:

J.... K....,
Circuit Judge.

2463. Petition to set off mutual judgments.¹

[*Title.*]

To the Court of County, State of

THE PETITION of C.... D.... respectfully represents that on the day of, 19.., a judgment was duly rendered and docketed by this court in this action in favor of the above named plaintiff and against your petitioner for the sum of dollars, damages and costs, and that no part thereof has been paid and the same is still owned by said plaintiff as your petitioner is informed and verily believes.

That on the day of, 19.., in an action then pending in the court of county, in which your petitioner was plaintiff and said A.... B.... was defendant, said last named court rendered a judgment in favor of your

¹ The power to set off judgments existing in the same right even in different courts is inherent. It arose in courts of equity but is now used by all courts. The ap-

plication should be made to the court in which the judgment is against the moving party and should be entitled in that action.

petitioner and against said A.... B.... for dollars, damages and costs [*if latter judgment was rendered in another court add, a certified copy of which judgment is attached hereto marked Exhibit A*].

That no part of said last named judgment has been paid and that the same is still owned by your petitioner.

That neither of said judgments have been reversed and that the same are capable of set-off against each other, both being rendered in the same right.

WHEREFORE your petitioner prays that said last named judgment be set off against said judgment first above described and that said first named judgment be satisfied of record so far as such set-off will pay the same, and that he recover the costs of this motion.

C.... D....,

Petitioner.

[*Add verification as in case of a pleading.*]

[*The petition should be brought to a hearing upon a notice of motion or order to show cause.*]

2464. Order setting off judgments.

[*Title.*]

[*Caption as in Form 7.*]

The motion of the said defendant to set off that certain judgment hereinafter described against the judgment rendered by this court in the above entitled action coming on to be heard, upon the verified petition of said defendant and the record in this action [and the affidavit of A.... B.... in opposition] after hearing G.... H...., Esq., for the motion and E.... F...., Esq., *contra*,

IT IS ORDERED, that the judgment recovered by C.... D.... against A.... B.... in the court, on the day of, 19.., for dollars with interest thereon to this date amounting in all to dollars, be set off and deducted from the judgment rendered in the above entitled action, in favor of A.... B.... and against C.... D.... for dollars [and the interest due thereon], which leaves unsatisfied on the last named judgment the sum of dollars with interest thereon from this date, and that the clerk of this court make the proper entry of satisfaction in the docket of the judgment of this court.

Further ordered, that the said C.... D.... cause satisfaction to be entered of the judgment in his favor in the said court, to the extent of said set-off, and that said C.... D.... have the sum of dollars costs of this motion.

By the Court:

J.... K...., Judge.

2465. Order appointing receiver in a creditor's action (Wis. Stats. 1898 sec. 3029; C. C. Rule XXVII subd. 3).

[*Title.*]

Upon the summons and complaint herein, duly served, and the affidavit of A.... B...., it appearing that no receiver of the property and effects of the said C.... D.... has been appointed and that no supplementary proceedings against him are pending;

On motion of E.... F...., Esq., attorney for the plaintiff,

IT IS ORDERED:

1. That R.... C.... of, be and he hereby is appointed with the usual powers, rights and duties, receiver of the estate and property, real and personal, and things in action, and equitable interests belonging to the said C.... D...., and of any property, money or thing in action or actions due or held in trust for him, except such as is exempt by law from seizure or sale on execution, and except also where such trust has been created by, or the fund so held in trust has proceeded from, some person other than the said defendant himself.

2. That before entering upon the duties of his trust, the said receiver give security in the form of a bond to the clerk of this court, and his successors in office, in the sum of dollars, with two sufficient sureties, who shall justify as in case of arrest and bail, conditioned that the said R.... C.... shall duly account for all property and effects that shall come to his hands or control as such receiver, and pay and apply the same from time to time as he may be directed by the court and shall obey such orders as the court may make in relation to such trust, and in all things faithfully perform his duties as such receiver, upon the giving of which bond, and the approval thereof by the judge of this court, such receiver shall be vested with the usual duties, rights and powers of a receiver in a creditor's action as well as the powers and duties conferred by section five of Rule XXVII of the rules of the circuit courts.

3. That said C.... D.... appear before L.... M...., court commissioner, and assign, convey and deliver to said receiver as directed by said commissioner all his property not exempt from execution, equitable interests, things in action and effects, and all notes, bonds, mortgages, deeds, books and accounts, contracts, papers, evidences and securities relating to the same, at such time as the said commissioner shall require.

4. That said judgment debtor, C.... D...., appear before said court commissioner from time to time, and at such times as he shall designate, and produce such books and papers, and submit to such examination on oath as said commissioner shall

direct, in relation to any matter which he may be legally required to disclose.

5. And the said plaintiff or said receiver shall be at liberty to apply to the court from time to time, for such further order or directions as may be necessary.

By the Court:

J.... K....,
Circuit Judge.

2466. Assignment by debtor to receiver.

[Title.]

Pursuant to an order of this court made in the above entitled action and in consideration of one dollar, to me paid by R.... C...., receiver in said action, the receipt whereof is hereby acknowledged, I, C.... D...., the said defendant, do hereby give, grant, assign and convey and transfer to said R.... C...., as such receiver, all the property, equitable interests, things in action and effects, to me belonging or in any way appertaining at the time of the commencement of this action, to-wit, on the day of, 19.., except such as are exempt from execution, and all notes, bonds, mortgages, deeds, books and accounts, contracts, papers, evidences and securities, relating to the same. To have and to hold the same to him as such receiver, and to his successors and assigns, subject to the order and direction of said court.

In testimony whereof I have hereunto set my hand and seal, this day of, 19..

C.... D....

[Add acknowledgment.]

2467. Petition by receiver to be substituted as a party to a pending action.

[Title.]

To the Court for County:

THE PETITION of R.... C.... respectfully alleges:

1. That by an order duly made in an action pending in the court for the of, on the day of, 19.., wherein A.... B.... is plaintiff, and C.... D.... defendant, your petitioner was appointed receiver of [*state what he was appointed receiver of and his duties generally*] which trust he accepted, duly qualified under and is now engaged in the duties thereof.

2. That the action above entitled was pending at the date of such appointment, and is at issue, and the object of the same is [*here state the object of the action in general terms*].

3. That it is necessary for the proper protection of the in-

terests committed to your petitioner as such receiver that he be substituted for C.... D.... in said action to defend the same.

YOUR PETITIONER, therefore, prays that he be substituted in the place of C.... D.... as defendant in the above entitled action, to defend the same.

[*Date.*]

R.... C....

[*Add verification as in case of a pleading.*]

2468. Order requiring sheriff to take property and deliver same to receiver (Wis. Stats. 1898 sec. 2794).

[*Title.*]

It appearing by the affidavits of A.... B.... and L.... M.... that the above named defendant has disobeyed that certain order of this court made in this action on the day of, 19.., appointing R.... C...., Esq., receiver herein, and requiring said defendant to deliver his property not exempt from execution to said receiver, and that said defendant still holds said property, consisting of [*describe same*] and refuses to deliver the same to said receiver;

Now, therefore, on motion of E.... F...., attorney for said plaintiff,

IT IS ORDERED, that the sheriff of Dane county be and he is hereby commanded on receipt of this order to take possession of said property [*describe same*] wherever the same be found, and deliver the same to said R.... C.... as receiver aforesaid and make due return of his execution of this order with all convenient speed.

By the Court:

J.... K...., Judge.

2469. Account of receiver, outline form.

[*Title.*]

To the Court of County:

I, the undersigned R.... C...., appointed receiver in this action by order dated, 19.., do hereby render my account as such receiver as follows:

I report that there came into my possession as receiver the property described in the inventory attached hereto and marked Exhibit A.

That I received rents and profits from said property [*or, from the real property named in said inventory*] in the amount set forth in the statement hereto attached marked Exhibit B.

That I sold the personal property described in said inventory under direction of the court and that a full, true and itemized account of such sales is attached hereto and marked Exhibit C.
[*If real estate has been sold report same.*]

That I compromised the disputed claims by direction of this court and received therefor the sum of dollars as set forth in Exhibit D.

That Exhibit E attached hereto contains a full and complete statement of all claims proven and the amounts paid on them respectively as well as of all expenses, costs, counsel fees and other disbursements, and that the vouchers for the same are also attached hereto.

That a condensed statement of my account is as follows:

Debits.

Cash from sales of personal property \$.....

Cash from rents and profits

[*So proceed with debit items.*]

Credits.

Expenses as per schedule attached \$.....

[*So proceed with credit items.*]

That the balance remaining in my hands is the sum of dollars, which is deposited in the Bank of, subject to the direction of the court.

[*Date.*]

R.... C....,

Receiver.

[*Attach affidavit, see Form 470.*]

2470. Affidavit by wife as plaintiff in divorce action, for suit money, temporary alimony, etc.

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says that she is the plaintiff in this action and that the same is brought to secure a divorce from the defendant upon the grounds stated in her complaint of which a copy is annexed hereto.

That she is without means of support for herself or her children hereinafter named [*except, etc.*] and is also without means to pay the necessary expenses for counsel fees and disbursements in the prosecution of said action [*if she be sick or feeble in health state facts*].

That the children of said marriage consist of [*give names and ages*] and that she desires the custody of said children pending this action; that the defendant is not a proper person to have charge of said children for the reason that [*state facts*].

That said defendant threatens that he will do violence to the affiant; and that he will never permit her to have the care or custody of their children; that he will take them from her by force, and carry them away; and affiant verily fears that, unless restrained by the order of this court, he will carry such threats into execution.

[If it is desired to enjoin defendant from disposing of his property set forth facts showing that he proposes to do so, e. g.] : That the defendant is about to sell and dispose of his personal property, and convert the same into money, and remove with the same out of this state; that he threatens and gives out that he will do so, and is attempting to make such sales; that he has declared such to be his purpose to the plaintiff, and, as she is informed and believes, to others; and she believes and fears that, unless restrained by the order of this court, the defendant will remove his property out of this state, and depart therefrom so as to render ineffectual any judgment for alimony which she may obtain.

That the defendant is a strong and able bodied man and earns about the sum of dollars per week in his business as a, and that he has real and personal property amounting to the sum of dollars in value [*or otherwise set forth his financial condition*].

WHEREFORE affiant prays that said defendant may be required to pay affiant a suitable sum for her support and that of her said children pending this action, as well as a suitable sum for suit money to enable her to carry on the same, that the custody of said children be awarded her, and that defendant be restrained from interfering with her personal liberty or with her custody of said children and also from disposing of, incumbering or removing said property and for such further order as may be just.

A.... B....

[*Jurat.*]

[*Add corroborating affidavits.*]

2471. Order to show cause on foregoing affidavit.

[*Title.*]

On reading and filing the verified complaint of the plaintiff and the affidavits of said plaintiff and of N.... O.... and O.... P...., and on motion of E.... F...., attorney for the plaintiff,

IT IS ORDERED, that the above named defendant show cause, before me, at my chambers, in the court house, in the city of, in said county, on the day of, 19.., at o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the defendant should not be required to pay the plaintiff a suitable sum weekly for her support and maintenance and the support and maintenance of her children during the pendency of this action, and why [*proceed in the same way with the other matters included in the motion*].

And let a copy of said complaint and said affidavits be served with this order on the defendant, at least hours before the time fixed herein for showing cause.

And until the hearing of said order and further order thereon the defendant, his attorneys, agents and servants are hereby ordered to desist and refrain from selling, disposing of, concealing or removing out of this state any of the property of the defendant.

[Add order restraining defendant from interfering with the liberty of the plaintiff, if desired, pending the hearing of the motion.]

[Date.]

J.... K...., Judge.

2472. Affidavit of wife, as defendant in divorce action, for suit money, etc.

[Title.]

[Venue.]

C.... B...., being first duly sworn, on oath says that she is the defendant in this action.

That she has fully and fairly stated the case in this action to G.... H...., Esq., her attorney and counsel, who resides in the city of, in said county, and that she is advised by her said counsel upon such statement thus made, that she has a valid and substantial defense to said action, upon the merits and to the whole thereof.

That she is about to make answer to the complaint denying all the charges therein alleged as ground for divorce, and intends and desires to defend said action and to set up a counterclaim for divorce on the ground of cruel and inhuman treatment, to-wit *[here set forth the facts showing a cause of action on her own part for divorce]*.

That the affiant is without means to support herself or to defend this action *[except, etc.]*

That the plaintiff is of ample means, abilities and faculties; that he has *[here specify his property, ability to earn money, probable income, etc.]*

That she makes this affidavit for the purpose of moving for an order for suit money in, and a suitable allowance for her support, pending this action.

[If other relief, such as injunction against the plaintiff, is desired, state the facts justifying such relief substantially as in Form 2470.]

C.... B....

[Jurat.]

2473. Order for suit money, temporary alimony, etc.

[Title.]

The plaintiff's motion for suit money, temporary alimony, etc. [*state what motion includes*], coming on to be heard this day before me on the verified complaint, the affidavits of A.... B...., N.... O.... and O.... P.... in support of said motion, and the affidavits of Q.... R.... and R.... S... in opposition thereto; after hearing E.... F...., Esq., attorney for the plaintiff, and G.... H...., Esq., for the defendant,

IT IS ORDERED, that the defendant pay to E.... F...., the plaintiff's attorney, the sum of dollars, on or before the day of, 19.., as suit money, to enable the plaintiff to carry on this action, and that he pay to the plaintiff personally [*or, deposit in the bank for the use of and to the credit of the plaintiff*], the sum of dollars per week [*or, month*], to be paid or deposited each week [*or, month*], on Saturday [*or, if monthly, on the last Saturday of each month*], for the support and maintenance of the plaintiff, pending this action.

That the plaintiff be allowed the custody and charge of the infant children of the parties [*name them*] until the further order of the court, and that the defendant pay to plaintiff the sum of dollars per month, for their suitable support and maintenance, to be paid [*state time and place*].

That the defendant do absolutely desist and refrain from imposing any restraint upon the personal liberty of the plaintiff and from taking from her custody or charge any or either of said children.

[*If ground is shown for an order restraining the defendant from disposing of his property*]: That the defendant refrain from disposing of, concealing, removing out of the state, or encumbering any of his property, real or personal, until the further order of this court.

[Date.]

J.... K...., Judge.

2474. Petition for removal of action to United States circuit court on ground of diverse citizenship.

[Title in state court.]

To the Court for County, State of :

THE PETITION of C.... D...., the defendant above named, respectfully shows that he is a citizen of the state of, and that the plaintiff is a citizen of the state of ; that the above entitled action was commenced by the service of the summons therein on the defendant on the day of, 19.., at, in said state, and that said action is

brought to recover [*state briefly the character of the action*]; that the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of interest and costs, and that the time within which the defendant is required by law, or by any rule of court, to answer or plead to the complaint of the plaintiff in the action, has not expired; and your petitioner herewith presents his bond, with N.... O.... and O.... P...., good and sufficient sureties, for his entering at the next term of the circuit court of the United States, for the district of, on the first day of its next session, a copy of the record in the above entitled cause, copies of said process against petitioner and of all pleadings, depositions, testimony and other proceedings in the cause, and for the payment of all costs which may be awarded, if said circuit court shall hold that this cause was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in said suit, if special bail was originally requisite therein; and your petitioner hereby offers to furnish such additional surety as this honorable court shall require.

WHEREFORE your petitioner prays this court to accept said petition and bond, and to proceed no further in this action, pursuant to the provisions of the acts of congress in that behalf.

C.... D....

[*Verification.*]

2475. Bond accompanying foregoing petition.

KNOW ALL MEN by these presents, that we, C.... D.... of, as principal, and N.... O.... and O.... P.... of, state of, as sureties, are held and firmly bound unto A.... B.... of in the sum of dollars, to be paid to the said A.... B...., his executors, administrators or assigns; to which payment well and truly to be made and done, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals the day of, 19..

Whereas, the above bounden C.... D.... has petitioned the court of county, state of, for the removal of a cause therein pending wherein A.... B.... is plaintiff, and C.... D.... is defendant, to the circuit court of the United States for the district of, pursuant to the provisions of the acts of Congress in that behalf;

NOW, THEREFORE, the condition of the above obligation is such, that if the above bounden C.... D.... shall enter in such circuit court, on the first day of its next session, a copy of the record in such suit, copies of the process against petitioner,

and of all the pleadings, depositions, testimony and other proceedings in the cause, and shall pay all costs that may be awarded by said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and shall also then and there appear and enter special bail in such suit, if special bail was originally requisite therein, then this obligation shall be null and void, otherwise of force.

In presence of
[*two witnesses.*]
[*Venue.*]

C.... D...., [Seal.]
N.... O...., [Seal.]
O.... P...., [Seal.]

N.... O.... and O.... P...., being each duly sworn, each for himself deposes and says that he is one of the sureties in the foregoing bond and that he is a resident of the state of Wisconsin, and a property holder therein; that he is worth the sum of five hundred dollars over and above all his debts and liabilities, and exclusive of property by law exempt from execution.

N.... O....
O.... P....

[*Jurat.*]

[*Indorse approval by state court.*]

2476. Order of removal from state court to United States court.

[*Title in state court.*]

Upon reading and filing the petition of C.... D.... for removal of above entitled action to the circuit court of the United States for the district of, and the bond thereto attached, showing that all the proceedings for the removal of said above entitled action into the circuit court of the United States for the district of, pursuant to the statute in such case made and provided, have been taken, and that said suit is one proper for such removal, and on motion of G.... H...., Esq., attorney for the petitioner,

IT IS HEREBY ORDERED, that said suit be, and the same hereby is, removed into the circuit court of the United States for the district of, and the clerk of this court is hereby directed to transmit and deliver to the clerk of the circuit court of the United States for the district of, copies of the record, and of the process against said petitioner, and of all pleadings, depositions, testimony, and other proceedings in the cause.

[*Date.*]

By the Court:
J.... K...., Judge.

2477. Complaint in action to enforce log lien (Wis. Stats. 1898 secs. 3331-3339).

[*Title.*]

The plaintiff complaining of the defendants alleges:

I. That on and between the day of, 19.., and the day of, 19.., the plaintiff, at request of the defendant, C.... D...., performed labor and services in cutting and hauling [*or otherwise specify the kind of labor*] certain logs and timber at for days, and for which said defendant, C.... D...., promised and agreed to pay the plaintiff dollars per day [*or otherwise state contract*], and that the said defendant, C.... D...., is personally indebted therefor to the plaintiff in the sum of dollars, which sum is now due and unpaid.

II. That the logs and timber upon which said labor and services were performed, are described as follows [*describe the same as in claim for lien*].

III. That the last day of doing said labor and services was the day of, 19.., and on the first day of, 19.., thereafter, the plaintiff duly filed in the office of the clerk of the circuit court in and for county, his claim for a lien upon said logs and timber for said amount, which claim was made, signed and verified by plaintiff and set forth the nature of the debt for which a lien was claimed, the amount claimed to be due, a description of the property on which the lien is claimed and an averment that this petitioner claims a lien thereon pursuant to law.

IV. That the defendants, X.... Y.... and Y.... Z...., claim to own or have some interest in said property and are therefore made defendants in this action, but that said interest, if any, is subject to the plaintiff's said lien as plaintiff is informed and verily believes.

V. That four months have not elapsed since the filing of plaintiff's said claim for a lien,

WHEREFORE plaintiff demands judgment against said defendant, C.... D...., for the sum of dollars and interest from, 19.., with the costs and disbursements of this action, and prays that the same be adjudged a lien upon the logs and timber herein above described, pursuant to the provisions of chapter 143 of the statutes of Wisconsin for 1898 and the acts amendatory thereof.

E.... F....,
Plaintiff's Attorney.

[*Add verification.*]

2478. Affidavit for attachment to enforce log lien (Wis. Stats. 1898 sec. 3332).

[Title.]

[Venue.]

A.... B...., being duly sworn, says that he is the plaintiff in the above entitled action [*or if the affidavit is made by plaintiff's agent or attorney*]: E.... F...., being duly sworn, says he is the agent [*or, attorney*] for the plaintiff in the above entitled action and makes this affidavit on behalf and by authority of said plaintiff.

That said defendant, C.... D...., is indebted to the plaintiff in the sum of dollars over and above all legal set-offs and that the same is due for labor and services performed by said plaintiff for and at the request of said defendant, C.... D...., on and between the day of, 19.., and the day of, 19.., in cutting and hauling the following described logs and timber [*describe same*] [*or, in sawing and manufacturing logs, describing same*].

That on the day of, 19.., the plaintiff duly made, signed, verified and filed in the office of the clerk of the circuit court in and for the county of, his petition for a lien upon said logs and timber, duly setting forth in said claim the nature of the debt or demand for which the lien is claimed, and a description of the property as above given and therein claimed a lien thereon pursuant to law.

That affiant makes this affidavit for the purpose of obtaining a writ of attachment in this action for the enforcement of such lien.

[*If affidavit is made by agent or attorney, add*]: That this affiant makes this affidavit upon his personal knowledge of the facts [*or, upon information and belief*] derived from [*here state the grounds of his knowledge and belief, as for instance, admissions made by said defendant, C.... D...., to this affiant. See Wiley v. Aultman & Co., 53 Wis. 564*].

A.... B....,
[*or, E.... F....*].

[Jurat.]

[*The ordinary form of undertaking in attachment may be used.*]

2479. Writ of attachment to enforce log lien.

[Title.]

The State of Wisconsin to the Sheriff of the County of :

GREETING: You are hereby commanded to attach the following goods and chattels, to-wit [*here describe the logs, lumber,*

etc.], or so much thereof as shall be sufficient to satisfy the sum of dollars, with interest, costs and disbursements of suit, and hold the same subject to further proceedings in the above entitled action; and of this writ make due return to said court, according to law.

Witness, the Hon. J.... K...., presiding
judge of said circuit court for the county
of, at the court house in the city of
[SEAL.], in said county, this day of
....., 19..

R.... S....,
Clerk.

E.... F....,
Plaintiff's Attorney,
....., Wis.

2480. Affidavit of intervenor who seeks to defend log lien action (Wis. Stats. 1898 sec. 3340a).

[*Title.*]

[*Venue.*]

M.... N...., being first duly sworn, says that he is the owner of [*or, has an interest in, specifying the nature of the interest*] the following described logs, timber [*or other property, describing it*] upon which a lien is claimed in this action; and that he verily believes that said claim for lien is unjust and invalid.

M.... N....

[*Jurat.*]

2481. Undertaking by intervenor after judgment to stay execution in log lien action (Wis. Stats. 1898 sec. 3340b).

[*Title.*]

WHEREAS, judgment was rendered in the above entitled action, on the day of, 19.., in said court adjudging a lien in favor of the plaintiff upon certain property, to-wit [*here describe the same*], for the sum of dollars, damages and costs.

And, whereas, M.... N.... has filed an affidavit with the clerk of said court in said action to the effect that he is the owner of said property [*or, an interest in said property*], and that he verily believes that said claim for lien is unjust and invalid, and has appealed to the supreme court of said state from said judgment;

NOW, THEREFORE, in order to stay execution on said judgment, we, M.... N...., as principal, and N.... O.... and O.... P.... of, do hereby undertake pursuant to law, in the sum of dollars that if the plaintiff establish his

right to a lien on such property, they will pay the amount of the judgment in his favor with costs.

Dated this day of, 19..

M.... N....

N.... O....

O.... P....

[*Venue.*]

N.... O.... and O... ..P...., being first duly sworn, each for himself says that he is a resident and freeholder of the state of Wisconsin, and resides as stated in the foregoing undertaking signed by him. That he is worth the sum of dollars over and above all his debts and liabilities, in property within the state of Wisconsin, not by law exempt from execution.

N.... O....

O.... P....

[*Jurat.*]

2482. Petition for change of name (Wis. Stats. 1898 sec. 3520).

[*Venue.*]

To the Circuit Court of County:

THE PETITION of A.... B.... respectfully shows that your petitioner resides in in said county, and that he [*or, she*] is of the age of years; that he [*or, she*] desires that his [*or, her*] name be changed from A.... B.... to C.... D.... for the following reasons [*it seems desirable to state the reasons, e. g., difficulty of pronunciation or confusion of the name with that of others, though the statute does not require it*].

YOUR PETITIONER therefore prays that by an order of this court his [*or, her*] name may be changed to C.... D....

A.... B....

[*Add verification.*]

2483. Notice of application to change name (Wis. Stats. 1898 sec. 3522).

NOTICE OF APPLICATION FOR CHANGE OF NAME.

To whom it may concern:

PUBLIC NOTICE is hereby given that the undersigned will apply to the circuit court for county, state of Wisconsin, at the regular term thereof to be held at the court house in the city of in said county, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard for an order changing the name of the undersigned from A.... B.... to C.... D....

[*Date.*]

A.... B....

2484. Order changing name (Wis. Stats. 1898 sec. 3520).

STATE OF WISCONSIN.

..... Court, ... County.

In the matter of the petition of
A.... B.... for a change of
name to C.... D....

On reading and filing the petition of A.... B.... and the affidavit of M.... N...., showing due publication of notice of the application in the N.... Z...., a newspaper printed and published in said county of [*or if the publication be in the official state paper, the official state paper of the state of Wisconsin*], once in each week for six weeks successively, such publication beginning on the day of, 19.., and ending on the day of, 19.., and no sufficient cause being shown to the contrary,

On motion of E.... F...., attorney for the petitioner,

IT IS ORDERED, that the said petitioner's name be and the same is hereby changed from A.... B.... to C.... D...., and let this order be entered at length upon the records of this court and a copy thereof, duly certified, filed in the office of the register of deeds of said county.

[Date.]

By the Court:

J.... K...., Judge.

2485. Petition to establish heirship (Wis. Stats. 1898 sec. 3521).

[Venue.]

To the Court of County:

THE PETITION OF A.... B.... and C.... D...., who each reside in the town of, in said county, respectfully shows that your petitioner, A.... B...., is of the age of years and your petitioner, C.... D...., is of the age of years.

That your petitioner, A.... B...., has no lineal descendants, father or mother, or brothers or sisters living, and that your petitioner, C.... D...., is the nephew of said A.... B.... and his only collateral kindred living, as your petitioner is informed and believes.

That your petitioner, A.... B...., has property, real and personal, and desires to have the legal heirship of said C.... D.... established for the reason that the witnesses who know of such relationship are old and infirm and likely to die before your petitioner, A.... B...., thus rendering the fact of such relationship difficult of proof.

WHEREFORE your petitioners pray that by order of this court the fact of such legal heirship may be duly established.

[*Date.*]

A.... B....

C.... D....

[*Add verification.*]

2486. Affidavit to obtain stay of proceedings until another action is determined.

[*Title.*]

[*Venue.*]

C.... D...., being duly sworn, says he is the defendant in the above entitled action, which was commenced in this court on the day of, 19.., for the purpose of [*state object of action and present stage thereof*].

That on the day of, 19.., this defendant commenced an action in the court of county against said plaintiff for the purpose of [*state object and present stage of action*].

That the issues in the action last mentioned are the same as those involved in this action [*or, that some of the issues are the same, naming them*] and the decision of the last named action will settle and determine all questions of fact or law involved in this action for the following reasons [*state facts showing this to be true*].

That the issues in said action begun by this affiant are at law and entitle the affiant to the benefit of a jury trial, to which he claims that he is entitled.

That this affidavit is made for the purpose of moving for a stay of proceedings in the above entitled action until after the determination of the said action begun by this plaintiff.

C.... D....

[*Jurat.*]

2487. Order staying proceedings on foregoing affidavit.

[*Title.*]

[*Caption as in Form 7.*]

The defendant's motion for a stay of proceedings in this action coming on to be heard upon the affidavit of said defendant [and the affidavits of A.... B.... and N.... O.... in opposition thereto], after hearing G.... F...., Esq., for the motion and E.... F...., Esq., in opposition,

On motion of G.... H...., Esq., attorney for said defendant,

IT IS ORDERED that this action and all proceedings herein on the part of the plaintiff be and the same are hereby stayed

until the trial, final determination and entry of judgment in the action wherein C.... D.... is plaintiff and A.... B.... is defendant now pending in the court of county, or until the further order of this court, and that the plaintiff pay dollars, the costs of this motion.

By the Court:

J.... K...., Judge.

2488. Order staying proceedings until the costs of former action have been paid.

[*Title.*]

[*Caption as in Form 7.*]

[*Recitals as in last preceding form, varying them to meet the character of the motion*];

IT IS ORDERED that all proceedings on the part of the plaintiff in this action be and are stayed until the said judgment for costs is fully paid, and until the further sum of ten dollars, the costs of this motion, is also paid.

By the Court:

J.... K....,

Circuit Judge.

2489. Cross-complaint by defendant, outline form (Wis. Stats. 1898 sec. 2656a).

[*Title of action as originally commenced.*]

The defendant, C.... D...., answering the complaint herein and by way of cross-complaint against the plaintiff and the defendants [*name those who will be affected by the relief sought*], and also N.... O.... and O.... P.... who, this defendant prays may be brought into this action and made parties thereto, alleges:

[*Here plead as in an answer to the original complaint and then set forth the new cause of action substantially as in a complaint.*]

[*Conclude with a prayer for affirmative relief.*]

G.... H....,

Defendant's Attorney.

[*Add verification.*]

2490. Order bringing in new parties on filing of cross-complaint (Wis. Stats. 1898 sec. 2656a).

[*Title.*]

[*Caption as in Form 7.*]

The defendant, C.... D...., having filed a cross-complaint in this action, praying affirmative relief in relation to and affecting the subject matter of this action, and it appearing from the same that N.... O.... and O.... P.... are necessary

parties to a complete determination of the controversy involved in said cross-complaint,

On motion of G.... H...., attorney for said defendant,

IT IS ORDERED that said N.... O.... and O.... P.... be brought in as parties defendant in this action, and that the proceedings be amended to include them as defendants; that a copy of said cross-complaint and of this order be served upon each of them and upon each of the co-defendants of said C.... D.... within ten days from this date, and that they have twenty days after such service, exclusive of the day thereof, in which to answer said cross-complaint.

That the cause stand for trial at the present term [*add such further conditions as the case requires*].

By the Court:

J.... K....,

Circuit Judge.

2491. Petition to amend judgment to accord with the findings or decision.

[*Title.*]

To the Court for County:

THE PETITION OF A.... B.... respectfully shows that he is the plaintiff in the above entitled action; that in the judgment in this action, which was entered on the day of, 19.., an error was inadvertently made in this, to-wit [*here state the error and show in what respect the judgment differs from the findings or decision*];

That in furtherance of justice, the said judgment ought to be amended by [*state precisely the amendment necessary*].

That, as your petitioner is informed and believes, no rights of third parties have intervened or will be prejudiced by such amendment.

WHEREFORE, your petitioner prays that said judgment may be amended in manner aforesaid.

A.... B....

[*Jurat.*]

[*Add verification.*]

[*This petition should be brought to hearing by notice of motion or order to show cause.*]

2492. Order amending mistake in judgment.

[*Title.*]

[*Caption as in Form 7.*]

THE PETITION of the plaintiff herein that the judgment in this action be amended to conform to the findings of the court coming on to be heard, at said term, on the day of, 19.., due notice of said motion having been given to the defendant and proof thereof made and filed, and no one appearing

to oppose the same, and it appearing from the records and papers on file in this case that the matters alleged in said petition are true,

On motion of E.... F...., attorney for the plaintiff,

IT IS ORDERED that the judgment heretofore rendered in this action, be and the same is hereby amended, as follows, to-wit [*here specify the amendment to conform the judgment to the finding*].

By the Court:

J.... K....,

Circuit Judge.

2493. Order amending order without prejudice to proceedings already had.

[*Title.*]

[*Recitals substantially as in last form with such changes as the nature of the motion requires*];

On motion of E.... F...., plaintiff's attorney,

IT IS ORDERED that the order heretofore made in this action, on the day of, 19.. [*state its substance*], be and is hereby amended as follows [*state amendment*].

That all proceedings already had upon said order stand as if taken under the same as amended by this order.

By the Court:

J.... K....,

Circuit Judge.

2494. Affidavit for receiver in foreclosure action.

[*Title.*]

[*Venue.*]

A.... B...., being duly sworn, says he is the plaintiff in this action and that the mortgaged premises herein are, as he is informed and believes, worth less than the amount due upon the plaintiff's note and mortgage described in the complaint.

That the defendant, C.... D...., who is alone personally liable on said note, is insolvent and has no property subject to execution save said mortgaged premises;

[*If the value of the premises consists largely in buildings subject to fire and are uninsured, state the fact, and any other facts, such as non-payment of taxes, etc., showing danger of a deficiency on mortgage sale.*]

That since the commencement of this action the defendant, C.... D...., has received and is still receiving large sums for rental of said premises and has applied the same to his own use.

[*Jurat.*]

A.... B....

[*Add corroborating affidavits.*]

2495. Order to show cause in foreclosure why receiver should not be appointed.

[Title.]

Upon the affidavit of A.... B.... and N.... O...., and upon the complaint in this action and the papers, pleadings and proceedings heretofore filed and served herein,

Let the defendants show cause, at a term of this court to be held at the court house in the city of, on the day of, 19.., at the opening of court on that day or as soon thereafter as counsel can be heard, why a receiver of the rents and profits of the mortgaged premises described in the complaint in this action, should not be appointed with the usual powers and duties in such cases; and let a copy of this order and the said affidavits be served upon each of the defendants at least days before the time appointed for hearing said motion.

And, until the hearing of said motion it is ordered that said defendants, their agents and attorneys, refrain from collecting or receiving any of the rents and profits aforesaid.

Dated this day of, 19..

J.... K....,
Circuit Judge.

2496. Order appointing receiver in foreclosure.

[Title.]

[Caption as in Form 7.]

The plaintiff's motion for the appointment of a receiver herein having come on to be heard upon due notice, upon the affidavits of A.... B.... and N.... O.... and [*name affidavits submitted by the defendant*];

On motion of E.... F...., plaintiff's attorney,

IT IS ORDERED that R.... C.... of be, and he is hereby, appointed receiver herein to collect all the rents and profits of said mortgaged premises now due or to become due during the pendency of this action, said premises being described as follows [*describe them*].

That before entering upon his duties the said receiver execute to and file with the clerk of this court a bond in the sum of dollars, with sufficient surety, approved by the court for the faithful discharge of his duties, and that upon the execution and approval of such bond all the parties defendant who now owe or hereafter may owe rent for the said premises or any part thereof, pay the same to such receiver, whose receipt therefor shall be a full discharge to them to the amount so paid.

[*If there are growing crops add*]: That the said receiver take possession of the crops now growing upon said premises or now

harvested and being thereon, except such as are exempt by law, and convert the same into money without delay.

That out of the moneys so received said receiver pay all taxes on said premises now due or which shall fall due during his receivership and that he retain the balance in his hands subject to the further order of the court.

That all tenants or other persons now in possession of said premises pay to him all rents of said premises now due and unpaid or that hereafter may grow due, and that they be and are hereby enjoined and restrained from paying any rent for such premises, hereby required to be paid to such receiver, to the defendants or either of them or to any person other than said receiver.

And it is further ordered that said receiver institute and prosecute all actions or proceedings necessary to recover the rents he is hereby authorized to receive, or the possession of said premises or any thereof; and that he may, from time to time, lease the said premises to which this receivership extends, for a term not to extend beyond the time when said premises shall be sold at foreclosure sale [and to terminate at any time when this action shall be discontinued upon payment of the mortgage debt, and costs]; and that he may insure and repair said premises as necessity may arise and pay for the same out of the moneys in his hands.

That said receiver make report from time to time, of his doings in this behalf; and that he or either of the parties be at liberty at any time to apply to the court for further directions.

By the Court:

J.... K...., Judge.

CHAPTER CLXV.

CONDEMNATION PROCEEDINGS.

2497. Petition of freeholders to open street in a city under the general charter (Wisconsin).
2498. Report of board of public works on last preceding petition (Wisconsin).
2499. Resolution of common council ordering condemnation proceedings to be begun (Wisconsin).
2500. Petition to circuit court for condemnation of lands for a city street (Wisconsin).
2501. Judgment in street condemnation proceedings (Wisconsin).
2502. Petition by railway company to condemn lands for proposed railway (Wisconsin).
2503. Petition by railway company already in operation, to condemn station grounds or yards (Wisconsin).
2504. Petition by railway corporation to perfect title to land over which its track already is operated (Wisconsin).
2505. Petition by railway company to condemn interests of adjoining property owners in a street (Wisconsin).
2506. Petition by property owner for condemnation of land actually occupied by railroad company but never condemned (Wisconsin).
2507. Order requiring notice of hearing petition for condemnation by railway company (Wisconsin).
2508. Notice of hearing (Wisconsin).
2509. Order appointing guardian *ad litem* for infant or insane person interested in the land condemned (Wisconsin).
2510. Order appointing commissioners (Wisconsin).
2511. Oath of commissioners (Wisconsin).
2512. Request to commissioners to proceed with their duties (Wisconsin).
2513. Notice of meeting of commissioners (Wisconsin).
2514. Report of commissioners (Wisconsin).
2515. Receipt forwarded by property owner (Wisconsin).
2516. Notice of appeal from award of commissioners (Wisconsin).
2517. Judgment on appeal from award of commissioners (Wisconsin).
2518. Petition of log driving corporation for right to overflow lands (Wisconsin).
2519. Petition by drainage corporation to condemn land for ditches or canals (Wisconsin).
2520. Petition by state board of control, or other state board, for condemnation of lands necessary for state institution (Wisconsin).
2521. Notice of foregoing application (Wisconsin).
2522. Order appointing commissioners (Wisconsin).
2523. Oath of commissioners (Wisconsin).

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| <p>2524. Petition for condemnation of land (Minnesota).</p> <p>2525. Notice of presentation of petition (Minnesota).</p> <p>2526. <i>Lis pendens</i> to be filed with register of deeds (Minnesota).</p> <p>2527. Order appointing commissioners (Minnesota).</p> <p>2528. Commissioner's oath of office (Minnesota).</p> <p>2529. Report of commissioners (Minnesota).</p> <p>2530. Notice of filing commissioners' report (Minnesota).</p> <p>2531. Notice of appeal from award of commissioners (Minnesota).</p> <p>2532. Judgment after trial of appeal from award (Minnesota).</p> <p>2533. Application to sheriff by railway company for appointment of commissioners to assess damages for lands taken for railway purposes (Iowa).</p> <p>2534. Sheriff's order appointing commissioners on foregoing application (Iowa).</p> <p>2535. Notice of foregoing application to resident landowner (Iowa).</p> <p>2536. Report of commissioners to sheriff (Iowa).</p> <p>2537. Notice of appeal from foregoing assessment (Iowa).</p> <p>2538. Outline form of complaint in action for condemnation (North Dakota).</p> | <p>2539. Outline form of judgment in condemnation action (North Dakota).</p> <p>2540. Final order of condemnation (North Dakota).</p> <p>2541. Outline form of petition for condemnation by railway company (South Dakota).</p> <p>2542. <i>Lis pendens</i> to be filed with register of deeds (South Dakota).</p> <p>2543. Summons in condemnation proceedings (South Dakota).</p> <p>2544. Affidavit for publication of summons against unknown or nonresident owners (South Dakota).</p> <p>2545. Order of publication against unknown or nonresident defendants (South Dakota).</p> <p>2546. Judgment of condemnation (South Dakota).</p> <p>2547. Petition by railway company to condemn lands for right of way (Nebraska).</p> <p>2548. Order appointing appraisers on foregoing petition (Nebraska).</p> <p>2549. Direction to sheriff to summon appraisers (Nebraska).</p> <p>2550. Appraiser's oath (Nebraska).</p> <p>2551. Notice by landowner of assessment of damages by appraisers (Nebraska).</p> <p>2552. Report of appraisers (Nebraska).</p> |
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Section 3187a Wis. Stats. 1898, as amended by Chapter 227 Laws of 1905, requires all persons making application for the laying out, widening, or vacating streets, to file a notice of the pendency of such application in the office of the register of deeds. A form for such *lis pendens* will be found in this work. See Form 129a.

2497. Petition of freeholders to open street in a city under the general charter (Wis. Stats. 1898 sec. 925—155).

To the Common Council of the City of, in County, Wisconsin:

THE UNDERSIGNED, freeholders of the ward of said city, respectfully petition your honorable body to open, [widen], [extend], [or, change] a street in said ward [or, ... street in said ward], as follows [*state the location and extent of the proposed opening or change in general terms, but so that the same can be identified*].

[Date.]

[Signatures.]

[Ten freeholders must sign, and it is expedient to briefly describe the property owned by each freeholder opposite his name.]

2498. Report of board of public works in last preceding petition (Wis. Stats. 1898 sec. 925—156).

In the matter of the petition of
N.... O.... and others for
the opening [or, extension] of
..... street in the city of
....., ... county.

To the Common Council of the City of :

THE UNDERSIGNED, the board of public works of said city, to which was referred the petition of O.... P.... and others for the laying out of a street in said city, hereby respectfully report:

That we have ascertained and find that said petition is sufficiently signed by ten freeholders of the ward in said city and that the particular lots and parcels of land proposed to be taken for the laying out of said street are described as follows [*describe each lot and give name of owner*].

We further report that we have caused to be made and here-with return to your honorable body a plat of said proposed street which is attached to and made part of this report and marked Exhibit A.

[Date.]

[Signatures of Commissioners.]

2499. Resolution of common council ordering condemnation proceedings to be begun (Wis. Stats. 1898 sec. 925—156).

In the matter of the petition of
N.... O.... and others for
the opening [or, extension],
[or, widening] of
street, in the city of ,
..... county.

WHEREAS, a petition signed by ten freeholders of the ward of said city was presented to the common council on the

.... day of, 19.., and duly referred to the board of public works, on the day of, 19.., and

Whereas, the said board of public works duly made report to the common council, which report bears date the day of, 19.., in which they report that said petition is sufficiently signed; that the particular description of the lots, parcels, or subdivisions of land proposed to be taken, is as follows. [*describe same*], and submit a plat of the proposed street [*widening, or, extension, or, change*], so proposed to be made.

RESOLVED, that it is necessary to condemn the land designated in said petition and report, and above described, and indicated in said plat on file, for the purpose named in the petition.

That the city attorney be and he is hereby directed to commence and prosecute the proper proceedings for the condemnation and acquisition of said land.

2500. Petition to circuit court for condemnation of lands for a city street (Wis. Stats. 1898 sec. 925—159).²

STATE OF WISCONSIN,
Circuit Court for County.

In the matter of the application of the city of for the condemnation of lands for the opening of a street in said city, to be known as street.	}
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To the Circuit Court of County:

The city of in said county, by E.... F...., its city attorney, respectfully represents,

That on the day of, 19.., ten resident freeholders of the ward of said city, presented to the common council thereof a petition for the opening of a street in said ward, designating in general terms the location and extent of such laying out and opening, as follows [*give description as in petition*].

That said common council at a meeting held on the day of, 19.., duly referred said petition to the board of public works of said city for examination and report; and on the day of, 19.., said board of public works duly reported that said petition was sufficiently signed, and therein gave a particular description of each lot, parcel, or subdivision of land proposed to be taken, as follows, to-wit [*give description*

² The forms of notice to property owners and of the verdict of the jury are prescribed in section 925—159 Wis. Stats. 1898.

as in the report], and reported therewith a plat of the proposed street.

That thereafter, and on the day of, 19.., at a regular meeting of said common council that day duly held, a resolution was duly adopted by a majority vote of the members of said council declaring that it is necessary to condemn the land designated in said petition and report and above described, and directing the city attorney to commence and prosecute the proper proceedings for the condemnation and acquisition of said land, and that annexed hereto are true copies of said petition, the report of said board of public works and the resolution of said common council, and of said plat submitted by them, marked respectively Exhibits "A," "B," "C," and "D."

That annexed hereto is also a sworn list of the names and residences, so far as they are known to said city attorney or can with reasonable diligence be ascertained by him, of persons owning or being interested in said lands or any of them proposed to be taken.

WHEREFORE, your petitioner, by its said city attorney, prays that due proceedings be taken in this court, as by the statute made and provided, for the condemnation of said lands so described for street purposes, and for such further order, judgment or proceedings as may be proper in the premises.

E.... F....,

City Attorney.

LIST OF NAMES and residences of persons owning or interested in the lands proposed to be taken by proceedings under the within petition.

TRACT OR LOT.	NAME OF OWNER.	RESIDENCE.
[describe each lot]	[give name of each owner]	[give residence.]

[Venue.]

E.... F...., being first duly sworn, says that he is the city attorney of the city of, in said county; and that the foregoing petition by him subscribed is true to his own knowledge.

That the foregoing list of persons owning or being interested in the lands proposed to be taken for public use in the proceedings upon the annexed petition is a true, full, and complete list of said persons so far as known to him or as can with reasonable diligence, which he has duly exercised in that behalf, be ascertained by him.

E.... F....

[Jurat.]

2501. Judgment in street condemnation proceedings (Wis. Stats. 1898 sec. 925—159).

[Title as in last form.]

[Caption as in Form 7.]

The application of the city of, in said county, for the condemnation of certain lands hereinafter described coming on to be heard at said term upon the petition of said city by its city attorney, and due proof as required by law of due service of the notice of the presenting of such petition to this court having been made; it appearing therefrom that said notice was personally served upon [name persons] on the day of, 19.. [if served by publication and mailing on any persons, recite the fact];

And none of said owners or persons interested having appeared or answered [or: And M.... N.... and O.... P.... having appeared and answered, and the issue raised by such answer having been duly tried];

And the jury impanelled in said matter having rendered their verdict, by which they find that it is necessary to condemn the lands sought to be condemned in these proceedings for public use as prayed in said petition;

On motion of E.... F...., city attorney, for said petitioner,

IT IS ADJUDGED: that the lands described in said petition, and hereinafter described, be and they hereby are condemned for public use, for the purposes set forth in said petition, to-wit [describe the lands as in the petition and report].

By the Court:

J.... K...., Judge.

[If the verdict be against the condemnation the judgment should dismiss the proceedings.]

2502. Petition by railway company to condemn lands for proposed railway (Wis. Stats. 1898 sec. 1846).

STATE OF WISCONSIN.

Circuit Court of County.

In the matter of the petition of the
..... Railroad Company for the
condemnation of certain lands in
said county for railway purposes.

To the Circuit Court for said County of [or to the Hon.
J.... K...., judge of the Circuit Court for said County
of].

THE PETITION of the railroad company respectfully shows that said company is a railroad corporation duly

incorporated, organized and existing under the laws of the state of Wisconsin for the purpose of constructing and operating a railroad from [*state termini of the road according to its charter*] and that your petitioner intends in good faith to construct the railroad authorized by its said charter.

That for the purpose of constructing the main line of said railroad your petitioner seeks to acquire certain strips of land one hundred feet in width over and across those several tracts of land in said county hereinafter particularly described, and numbered from one to ten inclusive.

That your petitioner has already staked out the center line of its proposed road over the grounds so desired for its said main line, and that the route of said road has been located by its board of directors upon the line so staked out and that the real estate included within said strips of land, as hereinafter fully described, is required for the purpose of constructing and operating the main line of said railroad.

That the strips or parcels of land so required by your petitioner for the construction of its main track as so located are strips one hundred feet in width, being fifty feet on each side of the center line staked out as aforesaid, and that said strips cross the following described tracts or parcels of land in said county which said tracts or parcels are particularly delineated upon the map attached to and made part of this petition and marked Exhibit A, upon which map the said tracts or parcels are numbered to correspond with the numbers of said tracts as contained in this petition:

No.	DESCRIPTION.	NAMES OF OWNERS, OCCUPANTS OR PARTIES INTERESTED.	RESIDENCE AND P. O. ADDRESS.
1.	(Describe parcel)	A. B., owner C. D., tenant E. F., mortgagee	City of — County of — Wis. City of — County of — Wis. City of — County of — Wis.
2.	(Describe parcel)	(Give names)	(Give residence and address)

That the names, residences and addresses of all persons appearing of record or known to your petitioner to be the owners, occupants or to have any interest in said tracts of land above described, are correctly given in the foregoing table [that the names of the owners of tract No. seven and tract No. nine are unknown to your petitioner, *or* that the owner of tract No. five is a nonresident of the state of Wisconsin and his residence is

unknown to your petitioner], that, as your petitioner is informed and believes, none of the said parties so named as owners of or interested in said tracts of land are infants or of unsound mind [except, if any infants are interested give names and ages, and if any insane person is interested give name, also give name of guardian, if any, in either case].

[If it is sought to acquire a strip two hundred feet in width over any tract or tracts the petition should state the fact and give the reasons why a greater width is necessary; for example, see *Wis. C. Ry. Co. v. Cornell*, 49 Wis. 162.]

That your petitioner desires also to acquire the following tracts or parcels of land for station grounds and yard purposes, and that the same are required and necessary for the construction and operation of said proposed railroad, to-wit:

[Here give numbers and descriptions of tracts with names, residences and addresses of parties interested as in case of right of way.]

[Follow with an allegation as to the names, residences, etc., of the owners or parties interested in the lands desired for depot grounds and yards similar to that hereinbefore given as to the owners and parties interested in the right of way.]

That the tracts and parcels of land so required by your petitioner for station grounds and yard purposes, are fully and correctly delineated upon the said map marked Exhibit A and numbered to correspond with the numbers of the tracts as contained in this petition.

WHEREFORE your petitioner prays that an order be made prescribing the notice to be given of the time and place of hearing this petition [that a guardian *ad litem* be appointed to appear and act for, name infants or insane persons if any], that it be adjudged that your petitioner is entitled to acquire the lands herein sought to be acquired for railroad purposes, that commissioners be appointed to ascertain and appraise the damages occasioned by such taking and the compensation to be made to the owners or other persons interested in the said real estate, and that such other proceedings be had in the premises as are by law provided.

[Date.]

[CORPORATE SEAL.]

..... Railroad Company.
by L.... M....,
Secretary [or Attorney.]

[Venue.]

L.... M...., being duly sworn, says that he is an officer of

said corporation petitioner, to-wit, the secretary thereof [*or the attorney of said petitioner*] and is duly authorized to sign and verify the foregoing petition, that said petition is true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters he believes it to be true.

L.... M....

[*Jurat.*]

2503. Petition by railway company already in operation, to condemn station grounds or yards (Wis. Stats. 1898 sec. 1846).

[*Title and address as in last preceding form.*]

THE PETITION of the railroad company respectfully shows that said company is a corporation duly incorporated, organized and existing under the laws of the state of Wisconsin and is actually engaged in the operation of a railroad under its said charter from to in said state, which said railroad passes through the village of in said county.

That for the purpose of properly operating its said railroad in said village of, and of duly performing its duties as a common carrier for hire, it is necessary and requisite that your petitioner acquire certain parcels of land in said county, hereinafter described, for the purpose of building a passenger and freight station thereon [*or for switching yards*], and that it is the intention of your petitioner in good faith to use said lands when acquired for that purpose.

That the parcels of land sought to be acquired as aforesaid and which are necessary for the proper operation of said railroad are particularly described as follows [*give description with names, residences and addresses of owners and persons interested, as in last preceding form*].

[*Insert allegation as to the names and residences of owners or occupants, unknown or nonresident owners, and infants or insane persons as in last preceding form.*]

That the tracts and parcels of land so acquired by your petitioner for station grounds [*or for yard purposes*] are fully and correctly delineated upon that certain map attached hereto and marked Exhibit A, and are, respectfully, numbered to correspond with the numbers of said tracts as contained in this petition.

WHEREFORE, etc. [*prayer as in last preceding form.*]

[*Add verification as in last preceding form.*]

2504. Petition by railway corporation to perfect title to land over which its track already is operated (Wis. Stats. 1898 sec. 1852).¹

[*Title and address as in Form 2502.*]

[*Allege incorporation of petitioner and operation of its railroad as in last preceding form.*]

That petitioner's said railroad as so operated through said village was constructed in the year 19.. and has been continuously operated and maintained up to the present time and that it is the intention of the petitioner to continue to operate the same and use the land upon which the same is constructed for the purpose of such operation in the future.

That the said railroad as so constructed and operated crosses the westerly end of lot in block of said village and actually occupies a strip of land feet in width on each side of the center line of its said track across said lot, which strip is actually required and necessary for the operation of said road. That said strip of land as so occupied is particularly delineated in the map attached to this petition and made part hereof and marked Exhibit A.

That said lot is owned by A.... B.... of, and occupied under lease by C.... D.... of [*if any other persons are interested state names, residences and extent of interest so far as known, and if minors or insane persons are interested state names, ages, etc., as in Form 2502.*]

WHEREFORE, etc. [*prayer and verification as in Form 2502.*]

2505. Petition by railway company to condemn interests of adjoining property owners in a street (Wis. Stats. 1296a).

[*Title, address and allegation of incorporation and intention to construct road as in Form 2502.*]

That for the purpose of constructing and operating its said railroad petitioner requires for its use a portion of that certain street in the city of in said county known as street commencing at [*name point*] and ending at [*name point*], the portion so required being [*describe particularly the strip or portion required*]. That by ordinance duly passed by the common council of said city on the day of, 19.., and thereafter duly approved and published, your petitioner has acquired from said city the right to use said portion of said street

¹ A petition in substantially this form was held sufficient in C., M. & St. P. Ry. Co. v. Richardson, 86 Wis. 154.

for the construction of its said road and the operation thereof subject to the rights of the owners of lots adjoining said street. That the lots or parcels of land adjoining said portion of said street so sought to be acquired are particularly described as follows, the name and residence of the owner and other persons interested in each lot, so far as petitioner can with due diligence ascertain, being placed opposite each lot or parcel: ~

[Insert table of descriptions of lots with names and residences of owners and allegation as to infant or insane owners as in Form 2502.]

That the strip or portion of said street so required by your petitioner for railroad purposes is correctly delineated upon the map annexed to this petition marked Exhibit A, upon which map the lots and parcels of land owned by said adjoining property owners and hereinbefore described are correctly delineated, each lot being numbered to correspond with the numbers of said lots as hereinbefore given in this petition.

That your petitioner has already staked out the center line of its proposed road over the said portion of said street so desired for railway purposes over and opposite the lands of said adjoining lot owners, and that the route of said road has been located by its board of directors upon the line so staked out.

Your petitioner further states that it requires for the purposes of the construction and operation of its said railroad and for its right of way the whole of said strip of land hereinbefore described and delineated upon said plat, and therefore seeks by this proceeding to condemn for such purpose the title, rights and interests of said adjoining property owners in that portion of said street included in said strip.

WHEREFORE, etc. *[conclude with prayer and verification as in Form 2502.]*

2506. Petition by property owner for condemnation of land actually occupied by railroad company but never condemned (Wis. Stats. 1898 sec. 1852).²

[Title and address as in Form 2502.]

THE PETITION of A.... B...., of, respectfully shows that since the day of, 19.., he has been and still is the owner in fee of *[describe premises]* in the city of, county of, and state of

That on or about the day of, 19.., the railroad company, a corporation duly incorporated, organized

² This is in substance the form sufficient in *Babcock v. C. N. & W. Co.* 107 Wis. 280.
of petition which was held suf-

and existing under and by virtue of the laws of the state of Wisconsin, located and constructed a spur track of its said railroad upon and across the west end of petitioner's said land and has occupied and still occupies a strip of land feet wide across said land, particularly described as follows [*insert exact description*], which strip of land, together with petitioner's said lot, is correctly delineated in the map attached to this petition and marked Exhibit A.

That since said day of, 19.., the said railroad company has operated said spur track and occupied the said strip of land therefor without right and without payment therefor, and has never acquired any title thereto, and omits and delays to commence and prosecute condemnation proceedings, whereby petitioner has been damaged in the sum of dollars.

WHEREFORE petitioner prays for an order fixing the time and place for the hearing of this petition, and for the appointment of commissioners to appraise and determine the value of the land so taken, and the damages sustained by your petitioner, and that he may have such further order or relief as may be just.

[*Date.*]

A.... B....

E.... F....,

Attorney for Petitioner

[*Add verification.*]

2507. Order requiring notice of hearing petition for condemnation by railway company (Wis. Stats. 1898 sec. 1846).

[*Title as in Form 2502.*]

THE PETITION of the railway company in the above entitled matter, with the map annexed thereto, having been duly filed in the office of the clerk of said court,

IT IS ORDERED, that said petition be heard before this court [*or, before the undersigned circuit judge*] at, on the day of, 19.., at o'clock ..M., and that said petitioner give notice of the time and place of hearing said petition, which said notice shall state the filing of such petition, the object thereof, and shall refer by general description to the lands described in said petition, and shall be addressed to the parties named in such petition, and to all persons interested in said lands.

And it is further ordered that a copy of said notice be served personally, or at the last and usual abode of such owners and parties interested as aforesaid, not less than five days before

the date above fixed for the hearing of said petition, and by publication in the [name], a newspaper published at, in said county of, such publication to be made not less than ten days before the date above fixed for the hearing of said petition.

[If it appear that there are infants or insane persons interested who have general guardians add]: And it is further ordered that said petitioner also give notice in writing by personal service not less than five days before said hearing to G.... H...., guardian of Y.... Z...., an infant, that application will be made upon said hearing for the appointment of a guardian *ad litem* to act for the said Y.... Z.... in said proceeding. [Date.]

J.... K...., Circuit Judge.

2508. Notice of hearing (Wis. Stats. 1898 sec. 1846).

[Title as in Form 2502.]

To [give names of all persons described in the petition as having any interest in the lands to be condemned] and to all other persons interested in the lands hereinafter described.

TAKE NOTICE that the railroad company, a corporation, has filed its petition in the office of the clerk of said court, the object of which petition is to acquire title by condemnation for railroad purposes of the lands hereinafter described and to secure the appointment of three disinterested and competent freeholders as commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in said real estate so condemned, which petition states the facts required to be stated by law in that behalf; and that said petition will be heard before said court [or, before Hon. J.... K...., judge of said court] at on the day of, 19.., at o'clock ..M., or as soon thereafter as counsel can be heard [if it is necessary to appoint a guardian *ad litem*, and that application will then and there be made for the appointment of a guardian *ad litem* for Y.... Z...., a minor, to represent him in said proceeding].

The pieces or parcels of land sought to be acquired by this proceeding are particularly described as follows:

[Particularly describe the several parcels to be taken as described in the petition with names of owners and parties interested in each.]

[Date.]

By E.... F....,
Attorney.

..... Railroad Company,
Petitioner.

2509. Order appointing guardian ad litem for infant or insane person interested in the land condemned (Wis. Stats. 1898 sec. 1847).

[*Title as in Form 2502.*]

It appearing by the petition filed in the above matter that Y.... Z...., one of the owners of a part of the real estate sought to be condemned in this proceeding is an infant of the age of years [*or, an insane person*] and has no general guardian [*or, and that X.... Y.... of, is the general guardian of Y.... Z.... and has received due notice of the pendency of these proceedings and of the application for the appointment of a guardian ad litem for said Y.... Z.... to act for him in this proceeding*];

ORDERED that L.... M...., Esq., an attorney of this court [*see Rule IX, C. C. Rules Wis.*] be and he is hereby appointed guardian ad litem of said Y.... Z.... and authorized to act for said Y.... Z.... in this proceeding upon his filing a bond according to law in the penal sum of dollars, with sufficient surety to be approved by the clerk of this court, that he will faithfully account for and apply under the direction of the court any money or property of said ward which he may receive as such guardian, and faithfully and in all things discharge his said trust as such guardian.

[*Date.*]

By the Court:

J.... K...., Judge.

[*For form of bond see Form 98.*]

2510. Order appointing commissioners (Wis. Stats. 1898 sec. 1847).

[*Title as in Form 2502.*]

At a general term of said court held at the court house in the city of in said county on the first Monday in March, 19.., and on the day of said term, to-wit, the day of, 19..

Present Hon. J.... K...., circuit judge.

The petition of the Railroad Company, filed in the office of the clerk of this court on the day of, 19.., for the condemnation of certain real estate in said county for railway purposes, having come on to be heard, and due proof having been made and filed, showing due publication and service of the notice of such hearing as required by the order made herein of date, 19.., E.... F...., Esq., appearing for said petitioner and G.... H...., Esq., for A.... B.... [*or,*

no one appearing in opposition] [and L.... M...., Esq., having been appointed guardian *ad litem* for Y.... Z...., an infant, and having duly qualified as such] after hearing E.... F...., Esq., for the petitioner [and G.... H...., Esq., for said A.... B....] and the court being now fully advised;

IT IS HEREBY ORDERED and determined that the said petitioner, the Railroad Company, is entitled to take the strip of land [*or*, the parcels of land] described in its said petition for the uses and purposes of its right of way [*or* for depot, *or* yard purposes] which said lands so determined to be necessary to be taken are more particularly described as follows [*particularly describe each tract with the certainty necessary in a conveyance*].

And it is further ordered, that O.... P...., Q.... R...., and R.... S...., three disinterested and competent freeholders who reside in the county of, be and they are hereby appointed commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate described in said petition and hereby determined necessary to be taken in said county of for the purposes of said corporation, and to perform such other duties as they are authorized to perform by the statutes in that behalf made and provided, and shall hold their said office and appointment for the term of one year from the date hereof.

And it is further ordered, that the first meeting of said commissioners shall be held on the day of, 19..., at o'clock in the noon of that day, at in the of, and county of, and that said commissioners shall cause notice of the time when and place where they will meet to consider the amount of compensation to which said land owners are severally and respectively entitled, to be given to all parties interested. Said notice shall be personally served on each party interested, or his or her authorized agent or attorney, or guardian *ad litem*, or left at his or her residence or place of business with a person of suitable age and discretion, at least six (6) days before the time of such meeting; and if any parties interested are non-residents of this state, or their or either of their residence is unknown, and they or any of them have no authorized agent or attorney in this state known to such commissioners, such notice shall be published in the [*name newspaper*] at least days before the day fixed for said meeting.

And it is further ordered, that said commissioners shall be entitled to compensation at the rate of dollars a day for the time actually and necessarily employed in the discharge of

their duties as such commissioners, and all necessary expenses incurred by them in the discharge of their duties to be paid by the petitioner.

By the Court:

J.... K...., Circuit Judge.

2511. Oath of commissioners (Wis. Stats. 1898 sec. 1848).

[*Title as in Form 2502.*]

[*Venue.*]

O.... P...., Q.... R...., and R.... S...., being each duly sworn, each for himself says that he will support the constitution of the United States and the constitution of the state of Wisconsin, and faithfully discharge his duties as commissioner in the above entitled matter to the best of his ability.

O.... P....

Q.... R....

R.... S....

[*Jurat.*]

2512. Request to commissioners to proceed with their duties (Wis. Stats. 1898 sec. 1848).

[*Title as in Form 2502.*]

To O.... P...., Q.... R...., and R.... S...., Commissioners in the above entitled matter.

You and each of you are hereby requested to proceed to perform your duties as commissioners in the above entitled matter in respect to the lands sought to be acquired by the petitioner above named for railway purposes in said county and described as follows [*describe same*].

[*Date.*]

[*Signature.*]

2513. Notice of meeting of commissioners (Wis. Stats. 1898 sec. 1848).

[*Title as in Form 2502.*]

To [*name all parties interested in lands to be taken as set forth in petition*] and to all other persons interested.

The undersigned, having been appointed by order of the circuit court of county in the above entitled matter dated, 19.., commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate hereinafter described, determined to be necessary to be taken by said petitioner for railway purposes, and having taken and subscribed the oath required by law,

Now, therefore, you and each of you are hereby notified that the undersigned will proceed to perform our duties in respect to the parcels of land hereinafter described, and that we shall meet at o'clock in the noon, of, the day of

....., 19.., at, in the of, in said county, to consider the amount of compensation to which the several owners of said parcels are respectively entitled, and to view the said lands and to hear the allegations of the several parties interested in said lands respectively, and to ascertain, and appraise the value of each such parcel of land proposed to be taken, with the improvements thereon, and the damages sustained by the owner or owners by reason of the taking thereof, and to fix the compensation to be made to each of such owners thereof, at which time and place you and each of you may attend and be heard.

The pieces or parcels of land hereinbefore referred to are particularly described as follows [*describe each parcel with name of owner and other persons interested*].

[Date.]

O.... P....,	} Commissioners.
Q.... R....,	
R.... S....,	

2514. Report of commissioners (Wis. Stats. 1898 sec. 1848).¹

[Title as in Form 2502.]

To the Circuit Court of the County of

The undersigned commissioners in the above entitled matter appointed by order of this court dated, 19.., do hereby report:

That we met at the time and place appointed by the court therefor, to-wit [*designate same*], and severally took the oath prescribed by law. That having been requested in writing by [*name the person making request*] to proceed to perform our duties as such commissioners, in respect to the lands mentioned and described in said request, and embracing, amongst others, the lands hereinafter described, we did then and there agree upon, the day of, 19.., at o'clock ..M, as the time when, and [*here specify the place of meeting*], in the of, in said county, as the place where we would meet to consider the amount of compensation to which said land owners, and other persons interested, is or are entitled.

That we caused notice of such time and place appointed for our said meeting to be given to each party interested, by publishing such notice in the [*name newspaper*], a newspaper printed and published at, in said county of, the last publication thereof being at least six (6) days before the time appointed for our said meeting, and also by [*state upon whom personal service was made*].

¹ The statute requires a separate report as to the lands of each owner.

And we do further report that we met at the time and place mentioned in said notice, and viewed the premises hereinafter described, and embraced in said written request, and heard the proofs and allegations of the respective parties interested therein, and that we appraised and determined the value of the tracts or parcels of lands proposed to be taken, with the improvements thereon, and of each separate estate therein, and the damages sustained by the owner, by reason of the taking thereof, as follows:

Tract No. 1 [*describe tract*]. We appraise and determine the compensation to be made to the owners and other persons interested in said tract No. 1 as follows:

To A.... B...., owner in fee thereof, ... dollars.

To C.... D...., tenant of said tract for the term of years, ... dollars.

To E.... F...., who holds an estate for life in said tract, ... dollars.

[*Proceed in the same way as to other estates or interests.*]

And we further report that in the performance of our duties as commissioners we were occupied for four entire days and that we were attended by E.... F...., attorney for the petitioner, and by [*name who appeared adversely*].

[*Date.*]

O.... P....,	} Commissioners.
Q.... R....,	
R.... S....,	

2515. Receipt for award by property owner (Wis. Stats. 1898 sec. 1851).

[*Title as in Form 2502.*]

Received of the railroad company, ... dollars, being the amount awarded to me, by the commissioners in the above entitled matter, as compensation for the taking, by said company, of [*describe strip or parcel taken accurately as in the order appointing commissioners*], and in full satisfaction for the land so taken and all damages by reason thereof.

Witness my hand and seal this day

[SEAL.] day of, 19..

In presence of L.... M....

A.... B....

N.... O....

[*Venue.*]

Personally came before me this day of, 19.., the above named A.... B...., to me known to be the person who executed the foregoing receipt, and acknowledged the same.

Witness my hand and official seal.

[SEAL.]

X.... Y...., Notary Public.

My commission expires, 19..

2516. Notice of appeal from award of commissioners (Wis. Stats. 1898 sec. 1849).

[*Title as in Form 2502.*]

To [*name respondent*] and to G.... H...., Clerk of the Circuit Court for County, Wisconsin.

TAKE NOTICE, that the undersigned [*name appellant*] hereby appeals from the award of the commissioners in the above entitled matter, and from the whole thereof, fixing the amount of compensation to be made by said company to [*name appellant*], being the owner of the premises hereinafter described, for the taking by said company for railroad purposes of a strip [*or parcel*] of land, described as follows [*insert description as in award*], which award was filed in the office of the clerk of this court on the day of, 19..

[*Date.*]

[*Signature of appellant.*]

G.... H....,
Appellant's Attorney.

2517. Judgment on appeal from award of commissioners (Wis. Stats. 1898 sec. 1849)

STATE OF WISCONSIN,
Circuit Court for County.

At a regular term of said court held at the court house in the of, in said county, on the day of, 19.., and on the day of said term, to-wit, the day of, 19..

Present, Hon. J.... K...., circuit judge, presiding.

A..... B.....,	} Plaintiff,
vs.	
The Railroad Company,	
Defendant.	}

This action being at issue and coming on for trial at said term, upon the appeal of A.... B.... from the award of the commissioners appointed in the matter of the application of the railroad company for the condemnation of certain lands in said county for railroad purposes, which award bears date, 19.., and was filed on the day of, 19.., and said action having been tried before said court and a jury, and the

jury having rendered their verdict, wherein they find that the plaintiff has sustained damages in the sum of dollars by reason of the taking for railroad purposes of the following described lands [*describe same*].

And it appearing that the appellant has been successful upon said appeal and that the sum awarded him by said verdict is larger than the award of said commissioners in the sum of dollars.

IT IS ADJUDGED: that the plaintiff A.... B...., recover of the defendant the said sum of dollars in addition to the amount of said award which is now deposited in court and the sum of dollars, taxed and allowed as the costs of this action upon said appeal.

[If the verdict is for a less sum than the award of commissioners, or for no greater sum, the judgment should be]:

And it appearing that the appellant has been unsuccessful upon said appeal and that the sum awarded him by said verdict is no greater than the sum awarded by said commissioners [*or less than the sum awarded by said commissioners in the sum of dollars*].

IT IS ADJUDGED that the said plaintiff take nothing by his said appeal and that the said defendant recover the costs and disbursements, herein taxed at dollars, which sum shall be deducted from the amount of said verdict, leaving the amount thereof dollars, and [*if the award has been deposited in court*] it is further adjudged that the clerk shall pay to said plaintiff out of the moneys deposited in court the said last named amount, or so much thereof as said moneys deposited will pay, and return the balance of said deposit, if any, to the defendant.

By the Court:

J.... K...., Judge.

2518. Petition of log driving corporation for right to overflow lands (Wis. Stats. 1898 sec. 1777a).

STATE OF WISCONSIN.

In Circuit Court for County.

In the matter of the application of the
..... company, for the right to
overflow and acquire title to certain
lands in said county for log driving
purposes.

To the Circuit Court for County [or to the Hon. J....
K...., Circuit Judge of County].

THE PETITION of the company respectfully shows that it is a corporation duly created and existing under and by virtue of the laws of this state for the purpose of the improvement of a stream flowing in part through said county and known as the river, and the driving of logs, and for holding and handling logs thereon, and that for such purpose, it has taken prior possession of such stream and its tributaries with the intent in good faith to improve the same and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side rolling and flooding dams, and such other improvements as may be necessary for the purposes aforesaid.

That said stream is not navigable in its natural condition and can only be made navigable for the floating and handling of logs by the improvements which your petitioner has already made and is about to make for that purpose.

That said improvements require the overflowing of a number of tracts of land hereinafter described, and that your petitioner and the several owners of said lands can not mutually agree for the purchase, lease or use of said lands, or such easement therein as is necessary for your petitioner, nor can they agree upon the compensation to be made for the taking of said property by your petitioner for such use.

The following are the tracts of land above referred to:

I. The N. W. quarter of the N. E. quarter of section, town north, of range east [*or otherwise describe land*] owned by A.... B...., who resides at, and is of full age and sound mind [*if land is occupied by tenant state the fact and give name and address; if owner is an infant or insane state fact and give name of general guardian if any; if owner is unknown state fact*]. The part of said tract necessary to be overflowed and of which title is desired to be acquired in this proceeding is particularly described as follows [*describe same by metes and bounds as in a deed*].

II. The S. W. quarter of the N. E. quarter of section, town north, of range east [*or otherwise describe land*], owned by C.... D...., who resides at, and is of full age and sound mind, etc. [*proceed as above, and insert similar similar allegations as to all other tracts desired*].

WHEREFORE, etc. [*prayer and verification substantially as in Form 2502*].

[*The proceedings subsequent to the petition are substantially identical with railroad condemnation proceedings and the forms heretofore given may be readily adapted for the purpose.*]

2519. Petition by drainage corporation to condemn land for ditches or canals (Wis. Stats. 1898 sec. 1379-33).

STATE OF WISCONSIN.

Before Hon. J..... K.....,

County Judge of County.

In the matter of the application of the
..... company for the condemna-
tion of lands in said county for drain-
age purposes.

To the Hon. J.... K...., County Judge of said County.

THE PETITION of the company respectfully shows:

That your petitioner is a corporation duly incorporated and organized under the laws of this state for the purpose of constructing, maintaining and operating drains, canals, ditches or the like for the drainage and reclaiming a wet, submerged, overflowed and swamp lands, in order to promote the public health and welfare, in [*name sections or towns which the corporation by its charter is authorized to drain*].

That for the purpose of constructing said canals and ditches in order to drain and improve said lands, and thereby to promote the public health and welfare, it is necessary for your petitioner to acquire, and it desires to acquire title to the certain strips or parcels of land hereinafter more particularly described, and that it is the intention of said corporation to use the said strips or parcels of land desired to be acquired for such purpose.

That the names of the owners and parties interested in said lands through which said strips of land run are as follows, as to each tract respectively, to-wit:

Tract No. 1. [*Here describe the tract through which the strip runs and name the owners and other persons interested therein with their residences.*]

Tract No. 2. [*Describe same with names as in Tract No. 1.*]

[*Continue in the same way with all of the other tracts through which the ditches or canals run.*]

That your petitioner is unable to agree with said owners and parties interested, upon the value of such lands desired to be acquired for the uses aforesaid.

That your petitioner has surveyed its route for its canals, drains and ditches over the lands hereby sought to be acquired, and that the strips so surveyed and necessary to be acquired are described as follows, to-wit: A strip of land feet in width through the quarter of the quarter of section

number , in town number , in range number east, the north line of which strip begins at a point [*name point*] and runs due west to a point [*name point*], [*or otherwise describe strip with certainty*], all which are correctly delineated on the map hereto annexed and marked Exhibit A [*for greater certainty a map should be annexed*].

That the said strips or parcels are necessary for such canals, drains and ditches for the reasons following, to-wit [*give the reasons*].

That none of said owners, or parties interested, are infants, of unsound mind or unknown [*except, here state exceptions, if any, and state names of guardians, if any*].

That the said route of said drains, ditches and canals have been duly located by your petitioner's board of directors in accordance with said survey and that the said strips of land hereinabove described and set forth on said map are each and all of them required for the purpose of constructing, maintaining and operating your petitioner's drains, ditches and canals.

WHEREFORE, etc. [*prayer and verification substantially as in Form 2502*].

[*The subsequent proceedings closely follow the proceedings in case of condemnation by railroad corporations and the forms heretofore given in this chapter in such cases may be readily adapted.*]

2520. Petition by state board of control or other state board, for condemnation of lands necessary for state institution (Wis. Stats. 1898 sec. 605).

STATE OF WISCONSIN.

Before Hon. J. . . . K. . . . , Judge of
the Circuit Court of County.

In the matter of the application of the State
Board of Control of Wisconsin Reforma-
tory, Charitable and Penal Institutions,
for the condemnation of certain lands in
said county.

To Hon. J. . . . K. . . . , Judge of the Circuit Court of
County.

THE PETITION of the State Board of Control of Wisconsin Reformatory, Charitable and Penal Institutions [*or otherwise give legal name of board*] respectfully represents, that in the opinion of your petitioner one of the public institutions of said

state under the charge of your petitioner, to-wit [name institution] requires for its use certain parcels of land in said county which are hereinafter particularly described; that your petitioner is wholly unable to agree with the owners of said land upon the amount of compensation to be paid therefor [or that by reason of the fact that the owners of said land are infants or absent from the state, no agreement for the purchase of said land can be made without great delay].

That a correct description of said lands, together with the names and residences of the owners thereof, is as follows:

Tract No. 1. [*Describe same*] owned by A.... B...., occupied by C.... D.... as tenant of said A.... B...., both residing at [*name and describe any other interests in the land and give names and residences of owners. If owners are minors or insane persons give names, residences, and name and residence of general guardian, if any. If owners are non-residents state the fact.*]

Tract No. 2. [*Proceed as with tract No. 1.*]

[*In case an injunctional order preventing waste is desired*]: That said lands are required for the purpose of [state purpose] and that there are growing trees [or fruit trees] of great value thereon, the destruction of which would seriously impair the value of said land for such uses.

WHEREFORE your petitioner prays that it may be adjudged necessary that said lands be taken for public use, that commissioners be appointed to appraise the same as provided by law [that the owners of said lands and all other persons be enjoined from cutting or injuring any of the timber growing on said lands or committing any other waste thereon during the pendency of these proceedings].

[Date.]

The State Board of Control of, etc.
by O.... P...., President.

E.... F....,

Attorney for said Board.

[*The statute does not require verification but it would be well to verify the petition as in Form 2502, especially if an injunction is desired.*]

2521. Notice of foregoing application (Wis. Stats. 1898 sec. 605).

[*Title as in last preceding form.*]

To [name all owners and persons interested].

You and each of you are hereby notified that the undersigned [name the public board instituting the proceedings] will, on the

.... day of, 19.., apply to the Hon. J.... K...., judge of the circuit court of said county, at his chambers in the court house in the city of, in said county, at o'clock A. M. of that day, for an order adjudging it to be necessary that the lands hereinafter described be taken for the use of [*name institution*] and appointing commissioners to appraise said lands according to law.

Said lands so desired are described as follows [*insert description and owners names as in petition*].

[You will further take notice that at the same time and place application will be likewise made for an injunctional order restraining the owners of said lands and all other persons from cutting or injuring any of the timber or committing other waste on said lands during the pendency of these proceedings.]

[*Date.*]

[*Signature as in petition.*]

2522. Order appointing commissioners (Wis. Stats. 1898 sec. 605).

[*Title as in Form 2520.*]

At chambers before J.... K...., circuit judge, on the day of, 19..

Upon reading and filing the written application of [*name board*] for the condemnation of certain lands in said county hereinafter described for the use of [*name institution*] and for the appointment of commissioners to appraise said lands; due proof having been made and filed showing personal service of due notice of the making of said application upon each and all of the owners of said lands more than ten days prior to the making of said application, as required by law [*or recite service by publication if so made*], E.... F...., Esq., appearing for the petitioner and [*name any appearance for owners*].

IT IS ORDERED and determined, that it is necessary to take the said lands hereinafter described for the use of the [*name institution*] and that O.... P...., Q.... R.... and R.... S...., disinterested persons, residents of said county, be and they are hereby appointed commissioners to appraise said lands and that they give notice of the time when they will proceed to view and examine said lands and determine the value thereof according to law and make report of their said valuation to this court with all convenient speed.

[It is further ordered that the owners of said lands and all other persons do refrain from cutting or injuring any of the timber on said lands or committing any other waste thereon during the pendency of these proceedings.]

The lands hereinbefore referred to are described as follows
[describe lands and give names of owners as in petition].

[Fix compensation as in Form 2510.]

J.... K...., Circuit Judge.

2523. Oath of commissioners (Wis. Stats. 1898 sec. 606).

[Title as in Form 2520.]

[Venue.]

O.... P...., Q.... R.... and R.... S.... being each duly sworn each for himself says that he will support the constitution of the United States and the constitution of the state of Wisconsin and will faithfully and to the best of his ability examine the lands required to be taken in this proceeding and impartially estimate and appraise the value of the same.

O.... P....

Q.... R....

R.... S....

[Jurat.]

[The notice of meeting, commissioner's report, notice of appeal and judgment on appeal may be readily adapted from Forms 2513 et seq.]

2524. Petition for condemnation of land (Minn. Rev. Laws 1905 sec. 2524).

STATE OF MINNESOTA. }	District Court
County of }	 Judicial District.

In the matter of the application of the
 railroad company *[or if the
 application to condemn be by the
 state, the State of Minnesota by its
 Attorney General]*, for the con-
 demnation of certain lands in said
 county.

To the District Court aforesaid.

THE PETITION of the railroad company *[or the state of Minnesota by its attorney general]* respectfully represents: that your petitioner is a railroad corporation, incorporated, organized and existing under the laws of the state of Minnesota for the purpose of constructing and operating a railroad from *[state termini]* and intends in good faith to construct such railroad *[or if the petition be on behalf of the state for the use of a public board, that this petition is presented by said state of Minnesota on behalf and upon request of [name public*

board or other body] for the purpose of taking and condemning the lands hereinafter described for public use.

[The petition may follow substantially Form 2502; the present statute of Minnesota does not require that a map accompany the petition or that it be verified, but it is certainly advisable to verify the petition and to present a map for greater certainty, especially in view of the fact that the commissioners are authorized to require maps or plats to be furnished on the hearing before them.]

2525. Notice of presentation of petition (Minn. Rev. Laws 1905 sec. 2524).

[Title as in Form 2524.]

To *[name all owners or occupants of the lands named in the petition]*.

You, and each of you, are hereby notified that the undersigned *[name the corporation instituting the proceedings, or if the state be the moving party name it]* will, on the . . . day of . . . , 19. . , at . . . o'clock . . M. of that day, or as soon thereafter as counsel can be heard, at the court house in the city of . . . in said county, present to the district court for said county of . . . its written and verified petition, the object of which petition is to obtain an order of said court adjudging it to be necessary to take the lands hereinafter described for railroad purposes *[or for public use, describing the use]* and appointing commissioners to appraise the damages which may be occasioned by such taking.

The lands so desired to be taken are described as follows *[insert particular description of the lands with names of owners and occupants as in the petition]*.

And you are further hereby notified that you may appear at the said time and place and be heard and offer such competent evidence upon the subject matter of said petition as you may be advised.

[Date.]

[Signature.]

[To be served as a summons in a civil action upon residents and upon nonresidents by publication and mailing.]

2526. Lis pendens to be filed with register of deeds (Minn. Rev. Laws 1905 sec. 2525).

[Title as in Form 2524.]

PUBLIC NOTICE is hereby given that the above-entitled proceeding has been commenced and is now pending in and before the district court of . . . county, Minnesota, upon a writ-

ten and verified petition this day filed in said court, and that the object of said proceeding is to take and acquire for railroad purposes [or for public use, *describing the use*] the following described lands in said county of [*describe lands accurately, as in the petition, giving names of owners and occupants*].
[Date.]

[Signature.]

2527. Order appointing commissioners (Minn. Rev. Laws 1905 sec. 2526).

[Title as in Form 2524.]

The above entitled matter coming on to be heard before the court on the day of, 19.., Hon. J.... K...., district judge, presiding, and it appearing upon proof duly filed that due and written notice of the objects of the petition in said matter, and of the time and place of presenting said petition, has been duly and personally served upon all the owners and occupants of the lands named in said petition [except, etc.] more than ten days before this date [*if any be nonresidents and service has been made by publication, recite the fact and the filing of proof thereof*].

And the court having heard and considered the proofs offered, E.... F...., Esq., appearing for the petitioner and no one appearing in opposition [or G.... H...., Esq., appearing for, *name parties appearing in opposition*] and being now fully advised in the premises;

IT IS ORDERED and determined that the taking of the lands described in the petition and hereinafter described for public use for railroad purposes [*or otherwise name the purposes according to the fact*] is necessary and is authorized by law. Said lands so required to be taken are described as follows [*insert accurate description of lands to be taken, with names of owners*].

And it is further ordered that O.... P...., Q.... R.... and R.... S...., three disinterested persons, residents of said county, be and they are hereby appointed as commissioners to ascertain and report the amount of damages which will be sustained by the several owners of said lands on account of such taking thereof, with all the powers and duties conferred by law upon them [*fix time and place of first meeting, and compensation as in Form 2510*].

[*If the title or easement acquired is to be limited by the granting of rights and privileges in the lands to the owner, specify the limitation.*]

By the Court:

J.... K...., District Judge.

2528. Commissioner's oath of office (Minn. Rev. Laws 1905 secs. 2527, 2528).

[*Title as in Form 2524.*]

[*Venue.*]

O.... P...., Q.... R.... and R.... S...., being each duly sworn, each for himself says that he will support the constitution of the United States and the constitution of the state of Minnesota and will faithfully discharge his duties as commissioner in the above entitled matter to the best of his judgment and ability.

O.... P....

Q.... R....

R.... S....

[*Jurat.*]

2529. Report of commissioners (Minn. Rev. Laws 1905 sec. 2528).

[*Title as in Form 2524.*]

To the District Court of County, Minnesota.

The undersigned commissioners appointed by this court in the above entitled matter by order dated, 19.., do hereby report:

[*The report may follow generally Form 2514, making such changes as the differences in the statutes of Minnesota and Wisconsin render necessary. It should be accompanied by a map and should cover all the parcels taken.*]

2530. Notice of filing commissioners report (Minn. Rev. Laws 1905 sec. 2528).

[*Title as in Form 2524.*]

To [name petitioner and all owners and occupants of land taken.]

You and each of you are hereby notified that the undersigned, appointed commissioners by said court by order dated, 19.., in the above entitled matter, did on the day of, 19.., make and file in the office of the clerk of said court at in said county, their report of their proceedings and determination in the above entitled matter, in which they fixed and determined the amount of damages sustained by the several owners of lands taken for public use in said matter.

[*Date.*]

O.... P....

Q.... R....

R.... S....

Commissioners.

2531. Notice of appeal from award of commissioners (Minn. Rev. Laws 1905 sec. 2532).

[Title as in Form 2524.]

To [name respondent] and to L.... M.... Esq., Clerk of said Court.

TAKE NOTICE that the undersigned is the owner in fee [*or describe title or interest of appellant according to the fact*] of that certain parcel of land condemned for public use in the above entitled proceeding described as follows [*insert description*]. You will further take notice that the undersigned hereby appeals from that portion of the report of the commissioners in the above entitled matter filed, 19.., which awards damages to appellant in the sum of dollars for the taking of said lands above described [*or which omits to award damages to the appellant for the taking of said lands above described*], and this appellant claims that he has suffered damages by the taking of said lands in the sum of dollars, made up as follows [*enumerate different elements of damage with amount of each*]. And the grounds of this appeal are that said award is entirely inadequate in amount and does not compensate this appellant for the damages sustained by him by the taking of said lands.

[Date.]

A.... B....

2532. Judgment after trial of appeal from award (Minn. Rev. Laws 1905 sec. 2534).

[Caption and recitals of appeal and trial substantially as in Form 2517 and continue]:

IT IS ADJUDGED that the amount of damages payable to said A.... B.... by said [name petitioner] be and the same is hereby fixed and determined in accordance with said verdict at the sum of dollars, upon payment of which sum with interest from, 19.. [date of commissioner's report] [and costs taxed at dollars] the said [name petitioner] shall have the right to take for railroad purposes [*or for public use*] the following described lands, viz. [*insert description*] [*if entire estate is not condemned, but only an easement or special rights, describe same*], and may take possession of said premises and appropriate the same to the public uses for which they have been taken subject to the provisions of this judgment.

By the Court:

L.... M...., Clerk.

2533. Application to sheriff by railway company for appointment of commissioners to assess damages for lands taken for railway purposes (Iowa Code sec. 1999).

In the matter of the application by the
..... railway company, for the ap-
pointment of commissioners to assess
damages for the taking of certain real
estate in county for railway
purposes.

To L.... M...., Sheriff of County, Iowa.

The undersigned, the railway company, a corporation organized and existing under the laws of the state of Iowa, and operating a railroad line from to in said state, respectfully shows that it is necessary to take and hold for the location, construction and convenient use of its said railway, and for its right of way [*or name other purposes*], certain lands in said county hereinafter particularly described; that the owners of said lands refuse to grant to said company the right of way over said lands or the necessary interest therein required for said purposes [*or that the owners of said lands and said company can not agree upon the compensation to be paid for said lands*].

The lands so necessary to be taken are particularly described as follows [*insert description of each parcel with names and residences of owners and other persons interested therein*].

WHEREFORE said company hereby makes application for the appointment of six freeholders of said county of, not interested in the same or a like question, who shall inspect said real estate and assess the damages which said owners will sustain by the appropriation of said lands for the use of said corporation and make report thereon in writing.

[*Date.*]

The Railway Company.
By A.... B...., President.

2534. Sheriff's order appointing commissioners on foregoing application (Iowa Code sec. 1999).

[*Title as in last preceding form.*]

Written application having been made to me by the railway company, a corporation, for the appointment of commissioners to assess the damages sustained by the owners of certain lands in county, by reason of the appropriation of said lands for railway purposes [*a copy of which petition is attached to and made a part of this order*].

IT IS ORDERED that [*name freeholders appointed*], six freeholders of said county of, not interested in the same or a like question, be and they are hereby appointed commissioners, whose duty it shall be to inspect the several parcels of real estate described in the said application and assess the damages which the several owners thereof and parties interested therein will sustain by the appropriation of said lands for the use of said corporation, and make report thereof in writing to the undersigned as provided by law.

[*Date.*]

L. . . . M. . . . ,
Sheriff County, Iowa.

**2535. Notice of foregoing application to resident land owner
(Iowa Code sec. 2000).**

[*Title as in Form 2533.*]

To [*name all land owners and parties interested*].

You and each of you are hereby notified that upon written application by the undersigned to the sheriff of county, Iowa, for the condemnation of the lands hereinafter described for railway purposes [*name the particular purposes*] the said sheriff on the day of, 19. . . , did appoint [*name commissioners*] as commissioners to inspect said lands and assess the damages which the several owners thereof will sustain by the appropriation of the same for the use of the undersigned corporation.

And you are further hereby notified that on the day of, 19. . . , at the hour of o'clock in the noon said commissioners will view the said premises and assess the damages sustained by the taking thereof.

The lands hereinabove referred to are described as follows [*insert description of each parcel with names of owners and parties interested*].

[*Date.*]

The Railway Company.

By L. . . . M. . . . , Attorney.

[*The form of notice to a nonresident owner is prescribed by sec. 2002 Iowa Code.*]

**2536. Report of commissioners to sheriff (Iowa Code sec.
2004).**

[*Title as in Form 2533.*]

To L. . . . M. . . . , Sheriff of County, Iowa.

The undersigned [*give names*] commissioners appointed by you by order dated, 19. . . , to inspect the lands hereinafter described and assess the damages which the several owners thereof will sustain by reason of the appropriation thereof for the uses of the railway company, do hereby make report

that upon due notice we viewed said premises on the day of, 19.., and appraised the same and assessed the damages sustained by the taking thereof as follows:

1. To A.... B...., owner in fee of [*describe parcel*] dollars.

To C.... D...., tenant and occupant of said parcel under a lease expiring, 19.., ... dollars.

[*Proceed in same way with other interests, if any.*]

2. To E.... F...., owner in fee of [*describe parcel*] dollars.

[*Proceed in same way with all parcels.*]

And we do further report that the costs of said assessment are hereby fixed as follows [*state same*].

[*Date.*]

Respectfully submitted,

[*Signatures of Commissioners.*]

2537. Notice of appeal from foregoing assessment (Iowa Code sec. 2009).

[*Title as in Form 2533.*]

To [*name adverse party*] and to L.... M...., Sheriff of County, Iowa.

TAKE NOTICE that the undersigned owner of that piece or parcel of land taken in the above-entitled proceeding for railway purposes, which is hereinafter described, hereby appeals from that part of the assessment of damages made by the commissioners in said matter and dated, 19.., as awards to the undersigned the sum of dollars for the taking by said [*name company*] of that certain parcel of land described as follows [*describe parcel*].

[*Date.*]

A.... B....

2538. Outline form of complaint in action for condemnation (N. Dak. Rev. Codes sec. 5962).

STATE OF NORTH DAKOTA. }	In the District Court
County of }	 Judicial District.

The Railway Company,
Plaintff,

vs.

A.... B...., C.... D....,
and E.... F....,
[*name all owners or claimants*]
Defendants.

The plaintiff complaining of the defendants respectfully alleges:

I. That the plaintiff is a corporation duly incorporated, organized and existing under and by virtue of the laws of this state for the purpose of constructing and operating a railroad from to, in said state [*or otherwise describe the plaintiff according to the fact, showing that it is a corporation, association, or commission entitled by law to maintain the action*].

II. That for the purpose of a right of way for its said railroad it is necessary for the plaintiff to acquire and condemn an easement over certain strips of land, ... feet in width, extending across certain parcels of land in said county hereinafter described [*or otherwise describe the necessity according to the fact*].

III. That the said right of way of the plaintiff as now surveyed and located, and the general route and termini of said railroad, are as follows [*fully describe same*], and that attached to this complaint and marked Exhibit A is a map showing the route and location of said right of way so far as the same is involved in this action.

IV. That the strips or parcels of land sought to be condemned in this action are described as follows:

1. A strip of land, ... feet in width, running from east to west across that parcel of land described as follows [*describe entire parcel*], said strip being bounded and described as follows [*describe strip*], which said parcel of land is owned and claimed by A.... B...., one of the defendants herein [*or the owner of which said parcel of land is unknown to the plaintiff and cannot with due diligence be ascertained by it*].

2. A strip of land feet in width, running from east to west across that parcel of land described as follows [*describe entire parcel*], said strip being bounded and described as follows [*describe strip*], which said parcel of land is owned and claimed by A.... B...., one of the defendants herein [*or the owner of which said parcel of land is unknown to the plaintiff and cannot with due diligence be ascertained by it*].

[*Proceed in the same way with each separate ownership, giving an accurate description of the strip or parcel sought to be taken, and of the entire parcel of which it is a part.*]

WHEREFORE the plaintiff prays for judgment condemning the said parcels of land [*or an easement over the said parcels of land*] for railroad purposes [*or name the public use*] that the damages accruing to the various defendants by reason of such condemnation be assessed and that the right of the parties be fully determined as provided by law.

[*Add verification.*]

The Company,
by L.... M...., Attorney.

2539. Outline form of judgment in condemnation action (N. Dak. Rev. Codes sec. 5959 et seq.).

[*Title as in last preceding form.*]

This action having come on for trial at the regular term of said court, to-wit, on the day of, 19.., before Hon. J.... K...., district judge; and the issues therein arising upon the complaint, and the answers of [*name defendants answering*] having been duly tried before the court and a jury, and the said jury having returned their verdict therein, which verdict is in words and figures as follows [*recite verdict*], and the court having found and determined that the use to which the parcels of land hereinafter described are to be applied is a public use authorized by law, and that the taking of said lands is necessary to such use.

Now, therefore, on motion of G.... H...., Esq., attorney for the plaintiff,

IT IS ADJUDGED that the defendant A.... B.... have and recover judgment against the plaintiff for the sum of dollars, being the amount of damages ascertained and assessed by said jury for the taking of the interest of the said A.... B.... in that parcel of land described as follows [*describe parcel*].

That the defendant C.... D.... have and recover of the plaintiff [*proceed as above with the interests of all other defendants*].

By the Court:

L.... M....,
Clerk.

2540. Final order of condemnation (N. Dak. Rev. Codes sec. 5970).

[*Title as in Form 2538.*]

It appearing to the court that the plaintiff has paid the sums required to be paid to the defendants in this action by the judgment herein.

IT IS ORDERED that the parcels of land hereinafter described be and they are hereby condemned for the following uses and purposes [*name same*].

The parcels of land hereby condemned are particularly described as follows [*describe same particularly as in a deed; if an easement only is taken describe the easement*].

[*Date.*]

By the Court:

J.... K....,
Judge.

2541. Outline form of petition for condemnation by railway company (S. Dak. Rev. Codes C. P. sec. 864).

STATE OF SOUTH DAKOTA. } In Circuit Court
County of } Judicial Circuit.

The Railroad Company,
Plaintiff,

vs.

A.... B.... and C.... D....,

[Name all persons having interests in or liens upon the property as defendants.]

To the Circuit Court aforesaid:

The petition of the railroad company respectfully represents that said company is a railway corporation duly incorporated and organized under and by virtue of the laws of said state, and operates a railroad in said state from to

That it is necessary for the purpose of constructing and operating the main line of its said railroad that your petitioner take [or damage] those certain pieces or parcels of land in said county hereinafter described [*the purpose of the taking must be clearly set forth*].

[If by law it is necessary that the resolution or ordinance be passed by a corporation before the taking, allege the passage of the same and attach a copy.]

That correct descriptions of the lands sought to be taken [or damaged] in this proceeding, together with the names of all persons having interests in or liens upon each parcel thereof, are as follows:

Tract No. 1. [*Describe same and give names of all persons having or claiming interests in or liens upon the same.*]

Tract No. 2. [*Proceed as above.*]

[Date.]

The Railroad Company,
by A.... B...., President.

E.... F....,

Attorney for Plaintiff.

[Add verification as in the case of a complaint, adding the further statement that "the proceeding is in good faith for the purposes specified in the petition."]

2542. Lis pendens to be filed with register of deeds (S. Dak. Rev. Codes C. P. sec. 865).

[Title as in Form 2541.]

PUBLIC NOTICE is hereby given that the above-entitled

proceeding has been commenced and is now pending before the circuit court of county, South Dakota, upon a written and verified petition of the plaintiff filed in said court on the day of, 19.., and that the purpose of said proceeding is to take and acquire, for the use by the plaintiff as a right of way for railway purposes, the parcels of land hereinafter described [*or describe the use according to the fact*].

Correct description of the various parcels of land so proposed to be taken and over which the said proposed improvement is to be constructed, with the names of all persons having interests in or liens upon said property, are as follows [*describe same as in petition*].

[*Date.*]

[*Signature of petitioner.*]

2543. Summons in condemnation proceedings (S. Dak. Rev. Codes C. P. sec. 867).

[*Title as in Form 2541.*]

The State of South Dakota to the above-named defendants.

You are hereby notified that a petition in the above-entitled proceeding, signed and verified by the above-named plaintiff, was filed in the office of the clerk of the circuit court for county at the city of in said county on the day of, 19.., and that the said proceeding is a condemnation proceeding brought by the said plaintiff for the purpose of acquiring and taking certain lands in said county described in said petition for the use of said plaintiff as a right of way for railway purposes [*or describe the use according to the fact*]; and you are further hereby notified that if you do not appear in said proceeding within twenty days from the date of the service of this summons upon you, exclusive of the day of service, the plaintiff will apply to said court for an order to impanel a jury and ascertain the just compensation for the property proposed to be taken or damaged in said proceeding.

[*Date.*]

E.... F...., Plaintiff's Atty.

Postoffice address, ... S. Dak.

2544. Affidavit for publication of summons as against unknown or nonresident owners (S. Dak. Rev. Codes C. P. sec. 868).

[*Title as in Form 2541.*]

[*Venue.*]

E.... F...., being duly sworn, says that he is the attorney for the plaintiff in the above-entitled proceeding, and makes this

affidavit on its behalf; that the said proceeding is a condemnation proceeding brought by said plaintiff for the purpose of [*state purpose as in last preceding form*].

That the owners of and persons interested in the following described lands sought to be taken or damaged in said proceeding, to-wit [*describe lands*] are unknown to the plaintiff and can not with reasonable diligence be ascertained.

That the owners and persons interested in the following described lands, sought to be taken or damaged in said proceeding, to-wit [*describe lands*] are nonresidents of this state and reside as follows, as affiant is informed and believes [*state names and residences*].

WHEREFORE your petitioner prays for an order of publication of the summons herein as against said unknown [*or non-resident*] defendants as by statute provided.

E.... F....

[*Jurat.*]

2545. Order of publication against unknown or nonresident defendants (S. Dak. Rev. Codes C. P. sec. 868).

[*Title as in Form 2541.*]

Upon reading and filing the verified petition herein, filed, 19.., and the affidavit of E.... F.... filed in said proceeding; it appearing therefrom [*recite facts appearing as in last preceding form*].

IT IS ORDERED, that the summons herein be published for the period of thirty days, at least once in each week, in the N.... Z...., a newspaper published and of general circulation in said county of, in the manner provided by law, and that said summons so published have annexed thereto a notice that if said unknown [*or nonresident*] defendants do not appear in the said proceeding within thirty days from the date of the first publication of said summons the plaintiff will make application to this court for the order mentioned in the body of said summons.

[*Date.*]

By the Court:

J.... K...., Circuit Judge.

2546. Judgment of condemnation (S. Dak. Rev. Codes C. P. sec. 875).

[*Title as in Form 2541.*]

The above-entitled proceeding having come on for trial at a special term of said court, held at [*name time and place*] and the issues therein having been tried before the court and a jury, and the said jury having rendered their verdict, which is on

file and hereby ordered to be recorded, and the court being now fully advised;

On motion of E.... F...., attorney for the said plaintiff,

IT IS ADJUDGED and determined that the plaintiff take and acquire for its use as a right of way for railway purposes [*or describe public use according to the fact*] the pieces or parcels of land hereinafter described, and that the plaintiff pay as compensation, to the persons entitled thereto, the amounts ascertained by said verdict as follows, to-wit:

To A.... B...., owner of [*describe parcel*] the sum of dollars.

To C.... D...., tenant in possession of said last described land, the sum of dollars.

[*Proceed in the same way with all the parcels and interests.*]

By the Court:

L.... M...., Clerk.

2547. Petition by railway company to condemn lands for right of way (Cobb. Ann. Stats. Nebr. sec. 9973).

STATE OF NEBRASKA, ... County.

Before Hon. J.... K...., County Judge.

In the matter of the application of the
..... Company, for condemnation
of certain lands for railway pur-
poses.

To Hon. J.... K...., County Judge of County, Nebraska.

THE PETITION of the railway company respectfully represents [*allege incorporation and intention to construct road as in Form 2502*].

That your petitioner has actually staked out and located its right of way upon and over the parcels of land in said county hereinafter described, and has determined that said lands are necessary to be taken and occupied by it for the construction and operation of the said railroad.

That your petitioner has endeavored to obtain the consent of the several owners of said lands to such taking and appropriation, and to agree with them on the amounts of damages occasioned thereby, but that it has been and still is unable to agree with said owners as to said appropriation or as to the amount of the damages, and that said owners and each of them have

refused and still refuse to grant to your petitioner the right of way over said lands or to agree upon the compensation therefor, and your petitioner is unable to obtain any right in or to the use of said premises.

Your petitioner further shows that the several parcels of land aforesaid together with the names of the several owners and persons interested therein are as follows [*describe each parcel, with names and residences of owners and other persons interested, setting forth the estate or interest of each*].

YOUR PETITIONER therefor prays the appointment of appraisers for the assessment of the damages sustained by the owners and other persons interested in said lands by reason of the taking thereof by petitioner for railway purposes, and that such further proceedings may be had in the premises as are authorized by law.

[*Date.*]

The Railway Company,
By A.... B...., President.

[*Add verification.*]

**2548. Order appointing appraisers on foregoing petition
(Cobb. Ann. Stats. Nebr. sec. 9973).**

[*Title as in last preceding form.*]

Upon reading and filing the written petition of the railway company, duly verified in the above-entitled matter, it appearing that the allegations of said petition are true and that said petitioner is entitled to take and condemn for railway purposes the lands described in said petition;

It is ordered and adjudged that the following named persons, each of whom is a disinterested freeholder of the county of, in the state of Nebraska, and none of whom is interested in any like question, be, and the same are hereby selected and appointed as appraisers to carefully inspect and view the real estate and every part thereof in said petition described, and assess the damages which the several owners thereof shall sustain by reason of the appropriation of his or her lands or premises or rights or interests therein, for the use of the said petitioner, the Railway Company, and to make report in writing to the undersigned of their acts and doings in the premises, namely [*name commissioners*].

Given under my hand and the seal of my office this day of, 19..

J.... K...., County Judge,
..... County, Neb.

2549. Direction to sheriff to summon appraisers (Cobb. Ann. Stats. Nebr. sec. 9973).

[*Title as in Form 2547.*]

[*Venue.*]

The State of Nebraska, to the Sheriff of County, Nebraska.

GREETING: You are hereby commanded to summon [*name appraisers*], six disinterested freeholders of said county, not interested in a like question, to appear before me, J.... K...., county judge of county, on the day of, 19.., at o'clock .. M., at the county court room in county, Nebraska, to take the oath of office and to view the real estate sought to be condemned and taken by the Railway Company for its use for right of way, situated in county, Nebraska, and described as follows, to-wit [*describe premises*], being the land described in the petition filed with the county judge of county, Nebraska, on the day of, 19.., by the Railway Company, and to ascertain and assess all the damages which the owner or owners thereof and parties interested therein will sustain by the appropriation of said lands to the use of said railroad company, for the purposes hereinbefore mentioned, said commissioners to make report of their proceedings therein, in writing to me, J.... K...., county judge of said county.

You will make return of this writ on the day of, 19..

In witness whereof I have hereunto set my hand and the seal of the county court of county, Nebraska, this day of, 19..

[SEAL]

J.... K...., County Judge. *

2550. Appraisers oath (Cobb. Ann. Stats. Nebr. sec. 9973).

[*Title as in Form 2547.*]

[*Venue.*]

The undersigned [*name appraisers*] appointed by the county judge of county, Nebraska, appraisers of the lands sought to be condemned by the railway company in the above proceeding, for its use for right of way, in the operation of its said railroad, as described in its petition filed with said county judge on the day of, 19.., being each duly sworn, each for himself says that he is a freeholder in the county of, in said state, and is not interested in a like question to that involved herein, and that he will carefully and impartially inspect and view said real estate and assess all the dam-

ages which the owner or owners or parties interested therein shall sustain by the appropriation of said land to the use of said railroad company as herein specified, and that he will make report to the said county judge of all his doings in connection with the appraisement of said lands, and do all other acts required of him as such appraiser according to law, to the best of his ability.

[*Jurat.*]

[*Signatures.*]

2551. Notice to landowner of assessment of damages by appraisers (Cobb. Ann. Stats. Nebr. sec. 9973).

[*Title as in Form 2547.*]

To [*name all owners and persons interested*].

You and each of you are hereby notified that the Railway Company, a corporation organized and existing under the laws of the state of Nebraska, has located its right of way upon and over the following described parcels of land in the county of, state of Nebraska, viz. [*describe parcels proposed to be taken*].

And you and each of you are hereby further notified that on, the day of, 19.., at the hour of o'clock in the noon of that day the undersigned appraisers appointed in the above proceeding will enter upon, inspect, view and proceed to assess the damages sustained by you and each of you, by reason of the appropriation of said described lands and premises by the Railway Company, for its said purposes, in the manner prescribed by law.

[*Date.*]

[*Signatures of appraisers.*]

2552. Report of appraisers (Cobb. Ann. Stats. Nebr. sec. 9973).

[*Title as in Form 2547.*]

To Hon. J.... K...., County Judge of County, Nebraska.

The undersigned, appointed by you by order dated, 19.., appraisers of the lands sought to be condemned in this proceeding and hereinafter described, having duly qualified by taking the oath prescribed by law, and having given the notice prescribed by law, to all owners and parties interested in the lands hereinafter described, which oath and notice are attached to this report and made part thereof, do hereby report that we did, on the day of, 19.., at o'clock .. M. of that day, being the day and hour named in said notice, each personally and as a body carefully inspect and view the lands named in said petition and hereinafter described, and as-

sessed the damages which the owners of said lands and all persons interested therein have sustained by reason of the taking and appropriation of said lands for railroad purposes by the Railway Company, as follows:

For the taking and appropriation of [*describe parcel*] we assess all damages at the sum of dollars, of which sum we award to A.... B...., owner, the sum of dollars; to C.... D...., tenant, the sum of dollars [*if any other interests are taken name each and the amount awarded*].

[*Proceed in the same way as to all tracts.*]

Given under our hands this day of, 19..

[*Signatures of appraisers.*]

CHAPTER CLXVI.

WISCONSIN CORPORATION FORMS.

- | | |
|---|--|
| 2553. Articles of organization of a business corporation, original copy. | tion of banking corporation. |
| 2554. Statements of the corporate purposes, to be inserted in the articles in various cases. | 2565. Notice of first meeting of stockholders. |
| 2555. Verification to be attached to copy of articles for filing with register of deeds and secretary of state. | 2566. Notice of regular annual meeting of stockholders. |
| 2556. Certificate of secretary of state, of filing of articles of organization. | 2567. Stockholders proxy, general form. |
| 2557. Certificate of filing articles by register of deeds. | 2568. Suggested form of minutes of first meeting of stockholders. |
| 2558. Articles of incorporation of a state bank. | 2569. Short form of by-laws of stock corporation. |
| 2559. Certificate of filing articles, by banking commissioner. | 2570. Form of stock certificate. |
| 2560. Certificate of filing articles of incorporation of bank by register of deeds. | 2571. Contract by promoter to convey land to corporation to be formed. |
| 2561. Affidavit that corporation has not entered into combination, conspiracy, etc. | 2572. Resolution accepting property in payment for stock in corporation. |
| 2562. Certified copy of amendment to articles of incorporation, to be filed with secretary of state. | 2573. Resolution by directors calling in subscriptions to stock. |
| 2563. Certificate of secretary of state of filing amendment to articles. | 2574. Notice of calling installment of subscriptions. |
| 2564. Certified copy of amendment to articles of incorpora- | 2575. Resolution of directors ratifying unauthorized act of officer. |
| | 2576. Resolution by directors declaring a dividend on stock. |
| | 2577. Resolution of dissolution of corporation by stockholders. |

2553. Articles of organization of a business corporation, original copy (Wis. Stats. 1898 sec. 1772).¹

KNOW ALL MEN by these presents, that the undersigned, adult residents of the state of Wisconsin, do hereby make, sign and agree to the following:

¹ If the corporation be formed without capital stock the articles should state the fact thus, in place of article third: "This corporation is formed without capital stock," and should fix the time and place

of the first meeting. It should also contain a clause, in place of article six, stating the method and conditions upon which members shall be accepted, discharged or expelled.

ARTICLES OF ORGANIZATION.

Article First.—The undersigned have associated, and do hereby associate themselves together for the purpose of forming a corporation under Chapter 86 of the Wisconsin Statutes of 1898, and the acts amendatory thereof and supplementary thereto, the business and purposes of which corporation shall be [*here state fully the business intended to be transacted by the proposed corporation bringing it within some of the provisions of sec. 1771 Wis. Stats. 1898*] which said business is to be carried on within the state of Wisconsin, and especially within the county of, in said state.

Article Second.—The name of said corporation shall be [*give name*] and its location shall be in the city of, county of, state of Wisconsin.

Article Third.—The capital stock of said corporation shall be dollars and the same shall consist of . . . shares, each of which said shares shall be of the face or par value of dollars.

Article Fourth.—The general officers of said corporation shall be a president, vice-president, secretary and treasurer [*name other officers if any*] and the board of directors shall consist of [*name number*] stockholders.

Article Fifth.—The principal duties of the president shall be to preside at all meetings of the board of directors, and to have a general supervision of the affairs of the corporation [*name any other duties desired to be conferred on the president*].

The principal duties of the vice-president shall be to discharge the duties of the president in the event of the absence or disability, for any cause whatever, of the latter.

The principal duties of the secretary shall be to countersign all deeds, leases and conveyances executed by the corporation, affix the seal of the corporation thereto, and to such other papers as shall be required or directed to be sealed, and to keep a record of the proceedings of the board of directors, and to safely and systematically keep all books, papers, records and documents belonging to the corporation, or in any wise pertaining to the business thereof.

The principal duties of the treasurer shall be to keep and account for all moneys, credits and property, of any and every nature, of the corporation, which shall come into his hands, and keep an accurate account of all moneys received and disbursed, and proper vouchers for moneys disbursed, and to render such accounts, statements and inventories of moneys received and disbursed, and of money and property on hand, and generally

of all matters pertaining to this office, as shall be required by the board of directors.

The board of directors may provide for the appointment of such additional officers as they may deem for the best interests of the corporation.

Whenever the board of directors may so order the offices of secretary and treasurer may be held by the same person.

The said officers shall perform such additional or different duties as shall from time to time be imposed or required by the board of directors, or as may be prescribed from time to time by the by-laws.

Article Sixth.—Only persons holding stock according to the regulations of the corporation shall be members of it.

Article Seventh.—These articles may be amended by resolution setting forth such amendment or amendments, adopted at any meeting of the stockholders by a vote of at least two-thirds of all the stock of said corporation then outstanding.

IN WITNESS WHEREOF, we have hereunto set our hands, this day of, 19..

Signed in presence of

[two witnesses]

[Venue.]

A.... B....

C.... D....

E.... F....

Personally came before me this day of, 19.., the above named A.... B...., C.... D.... and E.... F...., to me known to be the persons who executed the foregoing instrument, and acknowledged the same.

O.... P....,

[NOTARIAL SEAL.]

Notary Public, Wisconsin.

My commission expires [date.]

[All incorporators must acknowledge.]

2554. Statements of the corporate purposes, to be inserted in the articles in various cases.

[*A general trading company*]: The engaging in and carrying on of a general mercantile, commission, and trading business in the city of in said state and elsewhere; the purchasing holding and selling of personal property of any and all descriptions, the buying, improving, selling and leasing of real estate in said state and elsewhere, and the performing of all other acts which may be incidental to the proper carrying on of such mercantile commission and trading business.

[*A merchandising business*]: The engaging in and carrying on of a general wholesale and retail merchandising business at in said state and elsewhere, in groceries, and provisions

of all kinds, and the acquiring and holding, by lease or purchase, of real estate for the carrying on of said business, and the transferring and selling of such real estate or leasehold interests, and the performing of all other acts which may be incidental to the proper carrying on of said merchandising business.

[*A social and benevolent society*]: to promote sociability and friendship among its members, to hold and conduct entertainments, excursions and social meetings of its members and to make, contract, and purchase or lease and hold all real property necessary for the purposes of said society; to render aid to its members, and mutual support and maintenance to such members, their families and kindred in case of misfortune, sickness, poverty or death.

[*To buy, plat and sell real estate*]: to buy that certain tract of land described as follows [*insert description*], [*or to buy lands in the county of and state of*] and to plat the same into lots and blocks and to mortgage, lease, sell or dispose of said lands, and to carry on a general business in the purchase and sale of real estate in said county.

2555. Verification to be attached to copy of articles, for filing with register of deeds and secretary of state (Wis. Stats. 1898 sec. 1772).

[*Venue.*]

A.... B.... and C.... D...., being each duly sworn, doth each for himself depose and say that he is one of the original signers of the above declaration and articles; that the above and foregoing is a true, correct and complete copy of such original declaration and articles, and of the whole thereof.

A.... B....
C.... D....

[*Jurat.*]

2556. Certificate of secretary of state, of filing articles of organization (Wis. Stats. 1898 sec. 1772 as amended by Laws 1905 c. 507).

UNITED STATES OF AMERICA. }
State of Wisconsin, Department of } ss.
State.

To all of whom these presents shall come, greeting:

I, N.... O...., secretary of state of the state of Wisconsin, do hereby certify that the original articles [*or a duly verified copy of the original articles*] of organization of the [*name corporation*] of which the hereto attached is a [*like*] duly verified

copy, were on the day of, 19.., accepted and filed in the department of state.

[SEAL.]

In testimony whereof, I have hereunto set my hand and affixed my official seal at the Capitol, in the city of Madison, this day of, 19..

N.... O....

Secretary of State.

2557. Certificate of filing articles by register of deeds (Wis. Stats. 1898 sec. 1772 as amended by Laws 1905 c. 507).

I, O.... P...., register of deeds of county, Wisconsin, do hereby certify that a duly verified copy of the original articles of organization of [*name corporation*] a corporation located in county, which articles had attached a certificate of the secretary of state of Wisconsin, showing that such articles were accepted and filed in the department of state, were on the day of, 19.., duly left and filed for record in my office.

Witness my hand and official seal this day of, 19..

[SEAL.]

O.... P....,

Register of Deeds,

..... County, Wis.

2558. Articles of incorporation of a state bank (Laws Wis. 1903 c. 234 subch. 2 sec. 2).

THIS IS TO CERTIFY that the undersigned adult residents of Wisconsin, A.... B...., C.... D...., etc. [*name subscribers with their residences*] have this day associated themselves together for the purpose of forming a banking corporation, and to become incorporated upon the terms and conditions, and subject to the liabilities prescribed in an Act of the Legislature of the State of Wisconsin, entitled "An act for the creation of banks and for the regulation and supervision of the banking business," approved May 13, 1903, and have assumed for such corporation the name of [*give name*] and which is to be used in all its dealings.

That the place where the business of banking of such corporation is to be carried on is the city of, in the county of and state of Wisconsin.

That the amount of capital stock of such corporation is thousand dollars, which is divided into shares of one hundred dollars each.

That the names and places of residence of the stockholders, and the number of shares held by each of them respectively are as follows, to-wit:

Name.	Residence.	County.	State.	No. of Shares.
A....	B....			
C....	D....			

That the period at which such corporation shall terminate will be on the day of, one thousand nine hundred and

Witness, our respective hands and
seals. the day of one
thousand nine hundred and

Signed and sealed in
presence of
[two witnesses]

A.... B.... [Seal.]
C.... D.... [Seal.]
[follow with all incorporators.]

[Add acknowledgment as in Form 2553.]
[Verification to be attached to copy to be filed with commis-
sioner of banking.]

[Venue.]
A.... B.... and C.... D.... being each duly sworn, doth
each for himself depose and say that he is one of the signers
of the original articles of incorporation of [name corporation]
located at the city of, county of, and state of
Wisconsin; that the above and foregoing is a true, correct and
complete copy of such original articles of incorporation, and of
the whole thereof.
[Jurat.]

A.... B....
C.... D....

2559. Certificate of filing articles, by banking commissioner.

UNITED STATES OF AMERICA. }
State of Wisconsin, State Banking } ss
Department.

To all to whom these presents shall come, greeting:
I, R.... S...., commissioner of banking of the state of Wis-
consin, do hereby certify that the original articles of incorpora-
tion of the [name bank] of, Wisconsin, of which the
hereto attached is a duly verified copy, were on the day of
....., 19.., approved and filed in the state banking depart-
ment.

[SEAL.]

In testimony whereof, I have hereunto
set my hand and affixed the official seal of
the state banking department at the Cap-
itol in the city of Madison, this day
of, 19..

R.... S....,
Commissioner of Banking.

2560. Certificate of filing articles of incorporation of bank by register of deeds.

I, O.... P...., register of deeds of county, Wisconsin, do hereby certify that a duly verified copy of the original articles of incorporation of [*name bank*], a banking corporation located in county, which copy of articles had attached a certificate of the commissioner of banking, of Wisconsin, showing that such articles were approved and filed in the state banking department, was on the day of, 19.., duly left and filed for record in my office.

Witness my hand and official seal this day of, 19..

[SEAL.]

O.... P....,
Register of Deeds,
..... County, Wis.

2561. Affidavit that corporation has not entered into combination, conspiracy, etc. (chap. 507 Laws Wis. 1905 sec. 7, chap. 506 Laws Wis. 1905 secs. 1770g, 1770h).

[*Venue.*]

A.... B...., being first duly sworn, on oath says, that he is the president of the [*name corporation*] a corporation organized and existing under the laws of the state of

That this affidavit is made for and on behalf of said corporation. That said corporation has not entered into any combination, conspiracy, trust, pool, agreement or contract intended to restrain or prevent competition in the supply or price of any article or commodity in general use in the state of Wisconsin or constituting a subject of trade or commerce therein, or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be manufactured, mined, produced or sold in the state of Wisconsin, or fix any standard or figure by which its price to the public shall be in any manner controlled or established.

A.... B....

Subscribed and sworn to before me this
.... day of, 19..

O.... P....,
[SEAL.] Notary Public.

[*The above affidavit must be sworn to by the president, secretary or general managing officer of the corporation.*]

2562. Certified copy of amendment to articles of incorporation, to be filed with secretary of state.

At a regular [or special] meeting of the stockholders of the [*name corporation*], a corporation organized under the laws of

the state of Wisconsin, which meeting was duly convened pursuant to the articles and by-laws of said corporation, and at which meeting were present, either in person or by proxy, the owners of shares of the capital stock of said corporation [*at least two thirds of all stock must vote in the affirmative*] the following resolution was duly adopted by the affirmative vote of all stockholders present.

Resolved, that the articles of association of said [*name corporation*] be so amended so as to increase [*or diminish*] the capital stock of said corporation from dollars to dollars [*or specify the change made*].

[*Venue.*]

We, the undersigned A.... B...., president, and C.... D...., secretary of [*name corporation*] do hereby certify that the foregoing amendment to the articles of association of said corporation was duly adopted at a regular [*or special*] meeting of the stockholders of said company, duly convened according to the articles and by-laws of said company, which meeting was held at the principal office of said corporation at the city of on the day of, in the year 19..

And we do further certify that such amendment was adopted at said meeting by the affirmative votes of the owners of more than two thirds of all the capital stock of said corporation then outstanding, and that the foregoing copy of such resolution and amendment to said articles of association is a full, true and correct copy of the original thereof.

In witness whereof, we, the said A.... B...., president, and C.... D...., secretary, have hereunto set our hands and have caused the corporate seal of the said corporation to be affixed hereto at this day of, 19..

[CORPORATE SEAL.]

A.... B...., President.
C.... D...., Secretary.

2563. Certificate of secretary of state of filing amendment to articles.

UNITED STATES OF AMERICA. }
State of Wisconsin, Department of } ss.
State. }

To all to whom these presents shall come, greeting:

I, N.... O...., secretary of state of the state of Wisconsin, do hereby certify that a certified copy of amendment to the articles of organization of the [*name corporation*] of which the

hereto attached is a like certified copy, was on the day of, 19.., accepted and filed in the department of state.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my official seal at the Capitol, in the city of Madison, this day of, 19..

N.... O....
Secretary of State.

2564. Certified copy of amendment to articles of incorporation of banking corporation (Laws Wis. 1903 chap. 234 subch. 2 sec. 13).

At a meeting of the stockholders of the [*name bank*] of, Wisconsin, held at the office of said bank in said city on the day of, 19.., at o'clock .. M., of that day, which meeting was called for the purpose of amending the articles of incorporation of said bank, and at which meeting shares of the capital stock of said bank were duly represented, the following resolutions were duly adopted:

“Resolved, that the third paragraph of the articles of incorporation of the said [*name bank*] be amended by striking out the following words in said paragraph where they occur, namely, ‘..... thousand’ and inserting in lieu thereof the words ‘..... thousand;’ also by striking out the words ‘.... shares of dollars each’ and inserting in lieu thereof the words ‘.... shares of one hundred dollars each’ so that the paragraph, as amended, shall read as follows:

“‘That the amount of capital stock of such association is thousand dollars, which is divided into shares of one hundred dollars each.’

“It was further resolved, that the president and cashier of said bank be authorized, under the seal of the corporation, to file proper certificates of such amendment with the commissioner of banking, as provided by sections 3, 13 and 44, Chapter II of the General Banking Laws of 1903.”

We, A.... B...., as president, and C.... D...., as cashier of the [*name bank*] do hereby certify that the foregoing is a true copy of the amendment to the articles of incorporation of the said bank, and which, at the special meeting of the stockholders of said bank, duly called for that purpose and held pursuant to law in the office of said bank in the city of, state of Wisconsin, on the day of, 19.., was duly adopted by a vote of two-thirds of all capital stock outstanding and the vote of all the stockholders present and represented at said meeting; that the entire number of shares outstanding is

....; that upon such adoption votes were cast, one for each share in the affirmative, there being votes in the negative, and the number of votes so cast being more than two-thirds of the entire amount of such stock or shares outstanding.

IN TESTIMONY whereof the said [*name bank*] has caused these presents to be executed by the president and cashier thereof and the corporate seal of said bank is hereunto affixed this day of, 19.., by its authority.

..... Bank.

[CORPORATE SEAL.] By A.... B...., President.
In presence of C.... D...., Cashier.
[*two witnesses*]
[*Venue.*]

Personally came before me this day of, 19.., A.... B...., as president, and C.... D...., as cashier of the [*name bank*], who are to me known to be such president and cashier, respectively, and to be the persons who executed the foregoing instrument and acknowledged the same as such officers, for the purposes therein mentioned.

[SEAL.] O.... P....,
Notary Public,
..... County, Wisconsin.

2565. Notice of first meeting of stockholders (Wis. Stats. 1898 sec. 1773).

To the stockholders of the [*name corporation*] and to each of them.

You and each of you are hereby notified that more than one half of the capital stock of said corporation has been subscribed and that the first meeting of said corporation for the election of directors and the transaction of such other business as may properly come before the meeting will be held at on the day of, 19.., at o'clock .. M.

[*Date.*] A.... B....
C.... D....
Signers of the articles of
organization of said corporation.

2566. Notice of regular annual meeting of stockholders.

Office of the [*name corporation*].

NOTICE is hereby given that the regular annual meeting of the stockholders of the [*name corporation*] will be held at the office of said company [*name place*] on the day of, 19.., at o'clock .. M., for the purpose of election of di-

rectors of said corporation and for the transaction of such other business as may properly come before said meeting.

The stock transfer books of said corporation will close at o'clock .. M. on the day of, 19.., and remain closed until o'clock .. M., 19..

[Date.]

C.... D....,
Secretary.

2567. Stockholders' proxy, general form.

KNOW ALL MEN by these presents that I, C.... D.... of, hereby constitute and appoint E.... F.... of, my true and lawful attorney, to appear for and represent me at all meetings, general and special, of the [name corporation] which may be called and held while I am a stockholder in said corporation, and I hereby grant him power and authority in my name and stead to vote at all such meetings upon the stock held by me as may appear by the books of said corporation, and to exercise all such powers as I might exercise if personally present at such meetings.

[Date.]

C.... D....

2568. Suggested form of minutes of first meeting of stockholders.

Pursuant to notice duly given to all stockholders [a copy of which notice is hereinafter given] the first meeting of the stockholders of the [name corporation] was held at

Present, the following stockholders [*name stockholders present with amount of stock held by each*].

Absent, the following stockholders [*name those absent*].

A.... B.... was called to the chair and C.... D.... was appointed secretary of the meeting.

The following stockholders were present by proxies duly executed [*name those present by proxy*].

The notice of meeting pursuant to which the meeting was held, with proof of service [*or publication thereof*], was presented to the meeting and ordered spread on the minutes as follows [*insert copy of notice with copy of proof of service*].

The chairman laid before the meeting a certified and verified copy of the articles of organization and certificate of the secretary of state showing the due incorporation of the company, which was ordered to be copied in full on the first pages of the book of minutes, preceding the minutes of this meeting.

A draft of proposed by-laws of the corporation was presented by L.... M.... which, after consideration and amendment, section by section, was adopted. Said by-laws so adopted are as follows [*insert copy of by-laws*].

The following persons were elected directors for one year by ballot [*insert directors elected and vote received by each by shares*].

Said directors, so elected, were declared by the chairman the duly elected board of directors for the ensuing year.

There being no further business the meeting adjourned.

Attest:

C.... D....,
Secretary.

A.... B....,
Chairman.

2569. Short form of by-laws of stock corporation.

BY-LAWS OF THE [*name corporation*].

ARTICLE I—Stockholders Meetings.

Sec. 1. The annual stockholders' meeting of the company for the election of directors and transaction of other proper business shall be held at [*name place and city*] on [*name day*] of each year, and written or printed notice thereof shall be given to each stockholder appearing upon the books, by the secretary, by mail, at least days before such meeting.

Sec. 2. Special meetings may be called at any time by the board of directors, and like notice shall be given thereof as in case of a regular meeting, which notice shall also specify the purpose for which the meeting is called.

ARTICLE II—Directors.

Sec. 1. The board of directors shall consist of members to be elected by the stockholders at the annual meeting [*if classified by the articles of organization provide for their election accordingly*].

Sec. 2. The board of directors shall meet at the principal office of the corporation, on the day of each month, and at such other times and places as they may determine, and a majority of the board shall constitute a quorum.

Sec. 3. In case of vacancies in the board of directors, by death, resignation or otherwise, the remaining members of the board shall elect a stockholder to fill the vacancy, who shall serve for the unexpired term of his predecessor and until his successor is elected and qualified.

ARTICLE III—Officers.

Sec. 1. The officers of the corporation shall be elected by the board of directors, by a majority vote, and the office of secretary and treasurer may be held by one person. The first election shall be held at the first meeting of the board of directors and imme-

diately after their organization, and subsequent elections shall be held annually at the first regular meeting of the board of directors after the annual stockholders' meeting.

Sec. 2. In case of a vacancy in any office the board of directors shall elect a successor to hold for the unexpired term.

ARTICLE IV—Amendments.

Sec. 1. These by-laws may be amended, added to or altered by a majority vote of the stockholders at any annual meeting or at any special meeting called for that purpose. [*If it is desired to give the directors power to add to or amend the by-laws insert such a provision.*]

2570. Form of stock certificate.

No. shares.

[*Name of Corporation.*]

Incorporated under the laws of the state of

Total number of shares Par value \$. per share.

This certifies that E.... F.... is the owner of shares of the capital stock of the [*name corporation*], full paid, transferable only on the books of the corporation by the owner in person or his duly authorized attorney, upon surrender of this certificate, properly indorsed.

[*Date.*] Witness the signatures of the president
[*SEAL.*] and secretary of said corporation and the
seal thereof.

C.... D...., Secretary. A.... B...., President.

[*Stub of certificate*]:

• Certificate No.

.... shares.

Issued to E.... F....

Date, 19..

Issued in place of certificate No.
surrendered.

Cancelled, 19..

Certificate issued in its stead as follows:

No. for shares.

2571. Contract by promoter to convey land to corporation to be formed.

KNOW ALL MEN by these presents that, whereas I, G.... H...., of, have purchased and received deeds of conveyance of the following described lands [*describe same*]; and whereas the subscribers to the capital stock of the com-

pany, a corporation about to be formed, are the real purchasers of said lands:

NOW, THEREFORE, I hereby agree to and with said subscribers that immediately upon the completion of the organization of said corporation, in consideration of the premises and of one dollar to me paid, I will convey said lands, and all my right, title and interest therein, to said corporation, together with all contracts which I may hold affecting the same.

Witness my hand and seal this
day of, 19..

In presence of G.... H.... [Seal.]
[two witnesses]
[Add acknowledgment as in case of a deed.]

2572. Resolution accepting property in payment for stock in corporation.

WHEREAS, G.... H...., of, proposes to convey to this company the following described property [*describe same*] in exchange for shares of full paid stock in the corporation, and it appears that the said property is actually worth [*more than*] the face value of said stock,

RESOLVED, that said proposal be accepted, and that upon delivery of sufficient conveyances of said property to this company, the president and secretary thereof be, and are hereby, authorized and directed to execute and deliver to said G.... H.... a certificate, or certificates, for said shares of full paid stock in this corporation.

2573. Resolution by directors calling in subscriptions to stock (Wis. Stats. 1898 sec. 1754).

RESOLVED, that an installment of ten per cent upon the subscription to the capital stock of this corporation be, and the same is hereby, called in, payable at..... within days from the day of, 19.., and that the secretary of this corporation be directed to give notice of this call to the subscribers for said stock, in the manner prescribed by the by-laws.

2574. Notice of calling installment of subscriptions.

OFFICE OF (*name corporation*).

NOTICE is hereby given to the subscribers for stock in the above named corporation, and to each of them, that by resolution of the board of directors of said corporation adopted, 19, an installment of per cent upon the subscrip-

tion to the capital stock of said corporation was duly called in, payable to at the office of said corporation in on or before, 19..

[Date.]

C.... D....,
Secretary.

2575. Resolution of directors ratifying unauthorized act of officer.

WHEREAS, the secretary of this corporation on the day of, 19.., assumed on behalf of the corporation to [*here describe particularly act to be ratified*].

RESOLVED, that the aforesaid action of said secretary be, and the same is hereby, ratified, approved and confirmed as the act of this corporation, to all intents and purposes, to the same extent as if it had been originally authorized by the corporation.

2576. Resolution by directors declaring a dividend on stock.

RESOLVED, that an annual dividend of per cent on the subscribed capital stock of this corporation be, and the same is hereby, declared out of the surplus earnings, the same to be paid to said stockholders by the treasurer at his office in on and after the day of, 19..

2577. Resolution of dissolution of corporation by stockholders.

WHEREAS, it appears to be for the best interest of the stockholders of this corporation that it should be dissolved, its business terminated and its remaining assets distributed according to law,

RESOLVED [the owners of more than two thirds of the capital stock of said corporation concurring therein], that the corporation known as [*name corporation*] be, and same hereby is, dissolved.

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